89-113

Supreme Court, U.S.
FILED
JUL 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PLYMOUTH STAMPING DIVISION,
ELTEC CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether an employer's decision to sell its assembly operations for legitimate business reasons breaches its duty to bargain under Section 8(a)(5) of the National Labor Relations Act and the decision of this Court in *First National Maintenance Corp. v. NLRB*, *in that:*

a. an employer has a mandatory duty to bargain over the decision to close a portion of its business for legitimate business reasons, unrelated to union animus, whenever "labor costs" are a contributing factor in that decision;

b. the NLRB, in conflict with the decision in *First National Maintenance Corp.*, correctly ruled that the decision of an employer to change the nature or direction of its enterprise by terminating assembly operations, can be converted from a nonmandatory to a mandatory subject of bargaining by an inference finding the decision turned upon "labor costs," based solely upon the employer's unsuccessful attempt to confer with the union for concessions, in advance of its decision to terminate, even though the overriding factors asserted by the company were economic reasons unrelated to "labor costs" or union animus; and

c. it is form over substance to treat an employer's termination of operations through a lease-purchase sales agreement, as creating a duty to bargain under the Court's subcontracting decision in *Fibreboard Paper Prod., Corp. v. NLRB*, rather than a partial closing with no duty to bargain under *First National Maintenance Corp. v. NLRB*.

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* Plymouth Stamping Division, Eltec Corporation, is a closely-held, non-public corporation. A Disclosure of Corporate Affiliations and Financial Interest was filed in the court of appeals.

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Eltec Stamping Division, Eltec Corporation, the charged party before the National Labor Relations Board ("Board"), respectfully prays that a petition for writ of certiorari issue to the decision and order of the United States Court of Appeals for the Sixth Circuit which enforced the Board's decision in the above styled case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 870 F.2d 1112 (6th Cir. 1989). The decision of the National Labor Relations Board is reported at 286 N.L.R.B. No. 85, 127 L.R.R.M. (BNA) 1021 (1987). Both decisions are reprinted in the attached appendix at pages 1a and 10a, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on March 27, 1989. A motion for extension of time was granted to June 25, 1989. Pursuant to Supreme Court Rule 29.1, this petition is timely filed and the Court has jurisdiction to review the judgment of the Sixth Circuit under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

SECTION 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) provides:

> It shall be an unfair labor practice for an employer(5) to refuse to bargain collectively with representatives of his employees, subject to the provisions of section 159(a) of this title.

SECTION 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d) provides:

> For purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either part to agree to a proposal or require the making of a concession:. . . .

III. STATEMENT OF THE CASE

A. Factual Background

Petitioner Plymouth Stamping Division, Eltec Corporation ("Eltec"), has been engaged in the stamping, sale, and distribution of automotive parts for light trucks in Plymouth,

Michigan. It had both assembly and production operations at this location. Eltec sold product principally to Ford and Chrysler corporations.

Prior to 1980, Eltec had contracted out various aspects of its business, including painting, plating, tumbling, heat treating, brazing and assembly. Prior to February 1980, Eltec regularly contracted out 80% of its total jobs.

Due to the change in the economy in the late 1970's, Eltec's position worsened as the nation's economic recession began to occur in the automotive industry. It lost money in fiscal years 1977, 1978 and 1979. "Interim financial statements reveal cumulative losses from $189,572 on 30 September 1979 to $459,098 on 29 February 1980." "21a n. 21".

In the summer of 1979, Eltec requested that its employees' bargaining representative, UAW Local 985, consider reopening the extant collective bargaining agreement to consider "Company Economic Survival Proposals." Eltec proposed that wage increases and benefit coverage increases be deferred. The union rejected this proposal on October 10, 1979.

On February 11, 1980, Eltec notified the Union bargainning committee that it planned to terminate its parts assembly operation at the end of the second shift working on February 15, 1980. The action involved the layoff of 24 of its 75 total employees. "12a". Eltec had entered into a lease-purchase arrangement with Stamtec Corporation of Ohio in January 1980 to perform assembly operations beginning March 1, 1980. Eltec offered to discuss the matter of the transfer further if the union chose to do so. Tr. at 1387-88.

A second meeting with the union and Eltec was held on February 14, 1979. At that meeting, Eltec explained to the union representatives that the termination of the parts assembly operation in Plymouth, Michigan, was necessary due to declining sales, high labor costs, high interest rates, excessive business taxes in Michigan, and Eltec's inability to automate further. Tr. at 73-74, 1396-97; 2a.

Eltec reaffirmed its willingness to consider further negotiations and made it clear, however, that it was seeking only a

commitment from the union by the following day to consider significant wage and benefit reductions, not necessarily an agreement, if Eltec was to delay the transfer. Tr. at 75, 92, 1337-38. The union requested that Eltec postpone action on its decision for at least a week until the union president returned from vacation. The union did not respond the next day as management requested and Eltec proceeded with the removal of its equipment and lease commitment to Stamtec Company in Wauseon, Ohio, on February 17 and 18, 1980, at a cost of almost $14,000.00. "13a".

On March 1, 1980, Stamtec commenced assembly operations. Pursuant to the lease agreement, Stamtec exercised its option to purchase Eltec's equipment on June 30, 1980, for $132,432 plus interest. Resp. Ex. 38, 39, 40, 41. Eltec has since maintained its production operations at the Plymouth, Michigan plant.

B. The Board's Decision

The union filed unfair labor practice charges with the Board upon leaving the company meeting on February 15, 1980, alleging violations of sections 8(a)(1) and (5) of the National Labor Relations Act. By a 2-1 decision of the Board, the Board ruled that under its decision in *Otis Elevator Co.*, 269 N.L.R.B. 891 (1984), Eltec's initial decision to transfer the parts assembly operation was a mandatory subject of bargaining because the decision "turned upon labor costs . . . and not . . . upon a fundamental change in the nature of the Respondent's business." 11a. The Board also held that the actual sale of Eltec's assembly equipment to Stamtec Corporation on June 30, 1989, amounted to a nonmandatory bargaining decision to partially close:

> We find the sale of the respondent's parts assembly equipment to Stamtec on 1 July resulted in an operational change that is properly characterized as a partial closing within the meaning of *First National Maintenance*. . . .

31a.

The Board did find that Eltec was confronted with serious economic problems which motivated it into action:

> The company's economic problems resulted from a 25% decline in sales, non-competitive wage rates and benefits for parts assembly employees, burdensome Michigan business taxes, and high workmen's compensation and unemployment taxes. When the union asked what could be done to keep the parts assembly jobs in the plant, the respondent indicated that it would need substantial wage reductions, a freeze on COLAs, reduced health benefits, a decrease in paid holidays, changes in the grievance procedure and relief form work rules.

12-13a.[1]

The panel of the Board also rejected Eltec's pre-move and post-move offers to maintain a dialogue with the union to bargain for return of the operation as demonstrative of reasonable ongoing opportunities of meeting a duty to bargain, which the union decided not to advantage itself of.

Chairman Dotson dissented. His decision was based upon the fact that the decision to transfer and subcontract the parts assembly operation "turned upon a fundamental change in the scope, nature, and direction" of Eltec's business and the sale was a "substantial capital restructuring." within the meaning of *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). "36a". In his view, the continued willingness of Eltec to discuss concessions with the union concerning labor costs in the entire Plymouth Division and to reconsider the transfer of the assembly operation did not establish that the decision to transfer only the assembly operation to Stamtec rested solely upon labor costs. "38a".

---

[1] The Board did not find Eltec had bargained in bad faith in violation of § 8(a)(5) in August 1979 when Eltec attempted to prove to the union the dire straits the business was in. The Board affirmed this economic fact: "The respondent's financial problems largely resulted from a deepening automotive recession characterized by plummeting sales. According to the respondent's financial reports, it experienced in fiscal 1980 a $1.9 million downturn in sales volume, or about a 25% drop with its already reduced sales levels of the preceding year." 21a.

C. The Court of Appeal's Decision

The Sixth Circuit agreed with the Board that the preliminary decision to terminate the assembly operation was a mandatory subject of bargaining. That court relied almost exclusively upon this Court's earlier decision in *Fibreboard Paper Prod., Corp. v. NLRB*, 379 U.S. 203 (1964), for guidance in resolving the matter rather than the more recent decision of this Court in *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). Basing its decision on *Fibreboard*, the circuit court engaged in "[t]he process of balancing labor's understandable concern with any decision which may affect job security and management's concern with maintaining entrepreneurial control and flexibility of decisionmaking necessarily requires that the decision whether mandatory bargaining should take place turns upon the particular set of facts presented in the individual case." "6a".

Taking what it considered to be guidance from the *Fibreboard* decision, 379 U.S. at 213, the court of appeals held three facts essential to its determination:

> (1) whether the decision has altered the company's 'basic operation;' (2) whether the decision contemplated substantial capital investment; and (3) whether imposing a bargaining requirement would 'significantly abridge' the employer's 'freedom to manage the business.' "
>
> An essential fact is whether labor problems *contributed* to the employer's decision to subcontract-such a connection indicates 'that collective bargaining in advance of the decision might have produced a union offer which could have affected the decision to transfer the jobs.' *Production Molded Plastics*, 604 F.2d at 453.

6a (emphasis added).

The court of appeals determined that the transfer was subject to mandatory bargaining for three reasons. First, because Eltec's decision was not final until the equipment was sold to Stamtec on July 1, 1980. In the court's view, the

transfer did not alter the nature of Eltec's business because Eltec could have terminated the lease in the interim period before the sale. Second, during the lease period, Eltec retained client purchase orders and monitored quality control of Stamtec production, and in its view, Eltec had not yet incurred substantial corporate expenses until the actual sale took place.

Third, the court found "most significant," that "problems concerning 'conditions of employment' were motivating factors behind respondent's decision to subcontract the parts assembly work." The court noted the action came "shortly after an unsuccessful attempt to negotiate economic concessions," with the union and the company's expressed willingness to further negotiate the matter until the sale became final. Accordingly, under *Fibreboard*, the court found Eltec's transfer decision to be a unilateral act evading the duty to bargain with the union over a condition of employment. 7a.

REASONS FOR GRANTING THE WRIT

A. THE WRIT SHOULD BE GRANTED TO SETTLE THE CONFLICT BETWEEN THE CIRCUITS THAT THE DUTY TO BARGAIN OVER THE DECISION TO TERMINATE OPERATIONS IS A MANAGEMENT PREROGATIVE NOT SUBJECT TO PRIOR MANDATORY BARGAINING.

The decision below conflicts with decisions of the United States Court of Appeals for the Fourth, Eighth and Ninth Circuits, as well as the decision of this Court in *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). If the presence of a concern for "labor costs" is all that stands in the way of the Board turning a business termination decision into a mandatory subject of bargaining, then few hard decisions, if any, employers may make would qualify for management discretion, unless, of course, it was based solely upon a lost contract, and thus subject to this Court's protection in *First Nat'l Maintenance*. The Sixth Circuit's reliance on the Board's narrowminded interpretation of *First Nat'l Mainte-*

nance in *Otis Elevator* and the subcontracting decision in *Fibreboard* are insupportable. A decision to terminate business operations plainly involves consideration of all costs of doing business, labor costs being just one.[2]

In the well explained decision of the Fourth Circuit in *Arrow Automotive Indus., Inc. v. NLRB*, 853 F.2d 223 (4th Cir. 1988), that court addressed the same question reached by the Sixth Circuit below, and held to the contrary. The Fourth Circuit properly analyzed the decision of this Court in *First Nat'l Maintenance.*

In *First Nat'l Maintenance*, this Court had before it the question whether a decision to close part of a business was subject to the mandatory duty to bargain. 452 U.S. at 667. The Court carefully reviewed the congressional intent that unions were not expected to become equal partners in the running of the business, 452 U.S. at 676, and that "there is an undeniable limit to the subjects about which bargaining must take place." *Id.*

Three types of management decisions were reviewed. The first type, including advertising, financing, product type and design were discussed by the Court as having "an indirect impact" on employment. 452 U.S. at 676-77. A second area involved layoffs, work rules, production quotas and recalls. These were to be within an "aspect" of the employment relationship and bargainable. The third type of management decision would directly affect jobs, "but had as its *focus* only the economic profitability. . .a concern under these facts wholly apart from the employment relationship. This decision involving a change in the scope and direction of the enterprise., is akin to the decision whether to be in business at all. . . ." *Id.*

The Court resolved the issue by focusing on what effect an adverse decision on the decision itself to close, as subject

[2] Other Circuits have noted the open question presented here. *Teamsters Local Union No. 171 v. NLRB*, 863 F.2d 946, 955 (D.C. Cir.1988) ("we withhold judgment. . . that an employer has no duty to bargain over a *decision* to close part of its business when that decision is motivated by legitimate economic concerns."); *Kirkwood Fabricators, Inc. v NLRB*, 862 F.2d 1303, 1306 (8th Cir. 1988).

to mandatory bargaining, might portend to business. It concluded that hard decisions based upon viability are not subject to mandatory collective-bargaining.

> Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business. It must also have *some degree of certainty beforehand* as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice. Congress did not explicitly state what issues of mutual concern to union and management it intended to exclude from mandatory bargaining. Nonetheless, in view of an employer's need for unencumbered decisionmaking, *bargaining* over management decisions that have a substantial impact on the continued availability of employment *should be required* only if the benefit, for labor-management relations *and* the collective-bargaining process outweighs the burden placed on the conduct of the business.

452 U.S. at 680 (emphasis added).

The Court considered this effect and found that even under the situation of a partial closing, the union's only position in the matter would be to delay the management decision or halt the closing and the delay caused by bargaining "may both be futile and cause the employer additional loss." *Id.* at 681, 683. If labor costs were an important factor, the employer would attempt to seek concessions from the union, as Eltec did here. "At other times, management may have great need for speed, flexibility, and secrecy in meeting business opportunities and exigencies. It may face significant tax or securities consequences that hinge on confidentiality, the timing of a plant closing, or a reorganization of the corporate structure." *Id.* at 682-83.[3]

[3] These actions reflect precisely what Eltec attempted to do with its "Company Survival" plan, even as the UAWs own auditor's review of Eltec's audited financial statements for the four prior years was reporting that Eltec was in a "somewhat precarious financial position." 22a.

Finally, the Court stressed that the difficulty of the employer would have predicting in advance whether the situation would require bargaining or whether it "involved economic necessity sufficiently compelling to obviate the duty to bargain. . . .Also labor costs may not be a crucial circumstance in a particular economically based partial closing." *Id.* at 685 (citations omitted). Even if "labor costs" were a central component of the decision, the employer would still not know "what amount of bargaining would suffice before it could implement its decision" and "[i]f an employer engaged in some discussion, but did not yield to the union's demands, the Board might conclude that the employer had engaged in surface'bargaining, a violation of its good faith." *Id.* at 685.

The "limits" of the *First Nat'l Maintenance* decision was explained by the Court to apply to situations where the employer's purpose "was to reduce economic loss" and in the absence of union animus. *Id.* at 687. Contrary to the Sixth Circuit's view of the amount of Eltec's initial capital expenditures here, that immediate cost to Eltec or any employer is an irrelevant limitation on its right to redirect and save its business:

> Finally, while petitioner's business enterprise did not involve the investment of large amounts of capital in single locations, we do not believe that the absence of "significant investment or withdrawal of capital," *General Motors Corp., GMC Truck & Coach Div.*, 191 N.L.R.B., at 952, is crucial. *The decision to halt work at this specific location represented a significant change* in petitioner's operations, a change not unlike opening a new line of business or *going out of business entirely.*

452 U.S. at 688 (emphasis added).

Hence, the Court concluded that "harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained

through the union's participation in making the decision." *Id.*

In *Arrow Automotive*, the Fourth Circuit carefully considered the application of these principles to the decision made by management to close one of four manufacturing plants. It noted that the "majority of commentators" agree that the decision to close, as not a mandatory decision of bargaining, is a per se rule. 853 F.2d at 227. The court cited the unanimous appellate decisions that an economically motivated decision to partially close is not a mandatory subject of bargaining. *Id.* These same considerations weigh heavily in the partial closing situation evidenced in the instant case.

Finally, the Fourth Circuit explained that the Board's decision in *Otis Elevator Co.*, 269 N.L.R.B. 891 (1984), especially relied upon by the Board in the instant case, was establishing an unwarranted exception to the rule set out in *First Nat'l Maintenance.* As the court proves, the Board's rule makes every decision to close a mandatory subject of bargaining when based on economic decisions in addition to labor costs. "We reject the Board's labor costs analysis here because it is flatly inconsistent with *First Nat'l Maintenance." Arrow Automotive,* 853 F.2d at 228.

The Fourth Circuit's explanation that "labor costs" are not clearly an extricable part of business costs is persuasive:

> The Board appears to suggest that Arrow's decision is not governed by *First Nat'l Maintenance* by distinguishing between "labor costs" and economic reasons" for a closing. *There is no basis in the Supreme Court's cases for any such distinction.* "Economic reasons" are not reasons distinct and apart from a desire to decrease labor costs. The Supreme Court uses the term "economic reasons" in contrasting business decisions from decisions based on anti-union animus." *See e.g., Fibreboard,* 379 U.S. at 208, 85 S.Ct. at 401-02 (describing Fibreboard's decision to contract out work to save labor costs as "economic" rather than anti-union). *Labor costs are inescapably a part of the economic*

picture of the enterprise, and management's consideration of them in basic business decisions does not render First Nat'l Maintenance inapplicable.

853 F.2d at 228 (emphasis added).

The decision of the Sixth Circuit below, accepting the Board's "labor cost" exception to *First Nat'l Maintenance*, also stands in sharp contrast with the decision of the Ninth Circuit in *NLRB v. Transmarine Navigation Corp.*, 380 F.2d 933 (9th Cir. 1967). In *Transmarine*, the court held that the employer's decision to relocate its business, under *Fibreboard*, is "[a] decision of such fundamental importance to the basic direction of the corporate enterprise and [therefore is] not included within the area of mandatory collective bargaining." 380 F.2d at 939. Similarly, the Eighth Circuit in *Royal Typewriter Co.*, 533 F2d 1030, 1039 (8th Cir. 1979), has held an employer has no duty to bargain regarding its decision to close a plant. That court also rejected the Board's "alternate contention, raised on review, that Royal's initial offer to discuss this issue with the Union precluded a subsequent refusal to bargain further on the subject." *Id.* at 1039 n.10.

Accordingly, the Board's "labor cost" analysis is simply an irrelevant device to bootstrap review of closing decisions in a manner rejected by this Court. "The Board's standard simply fails to give sufficient weight to the magnitude of the change involved here." *Arrow Automotive*, 853 F.2d at 228. The affect in the case at bar, is illustrative of the mischief the Board can invoke, it acting seven years after Eltec's decision to close its assembly operation was made. The consequences to management's need for flexibility in a fluctuating economy is gravely restricted by the split in the circuit court's. This question must be quickly settled by the Court.

B. THE UNDERLYING DECISION OF THE BOARD IN OTIS ELEVATOR WILL CREATE ENORMOUS BUSINESS DISTRESS UNLESS A UNIFORM APPLICATION OF FIRST NAT'l MAINTENANCE IS IMMEDIATELY APPLIED TO CASES INVOLVING PARTIAL CLOSINGS

The underlying decision of the Board in the instant case, *Eltec Corp.*, 286 N.L.R.B. No. 85, 127 L.R.R.M. (BNA) 1021

(1987), a 2-1 decision, rests on the earlier Board case in *Otis Elevator Co.*, 269 N.L.R.B. 891 (1984), wherein the Board found that the decision of United Technologies to consolidate its research and development centers did not implicate a mandatory duty to bargain because the decision was based upon "facts" that the "decision did not turn upon labor costs even though that factor may have been one of the circumstances which stimulated the evaluation process which generated the decision." *Id.* at 892. The Board there also decided that this Court's discussion of the limited relevancy of labor cost considerations in *First Nat'l Maintenance* applied in the *Otis Elevator* context of a relocation-consolidation decision. *Id.* at 894.

In the case at bar, the Board rejected Eltec's argument that there is any distinction between the decision of Eltec to move and sell the assembly operation upon a change in economic conditions, mandating a new direction of the business, or upon labor cost considerations. Having found just one part of Eltec's decision based on "labor costs," this turned the matter into a mandatory subject of bargaining. The Board, thus, expressly disadvantaged Eltec for its continued willingness to even allow the union to propose an alternative, *see Royal Typewriter Co., supra at 12,* which four months earlier the union had rejected.

The Board's underlying decision relies on Eltec's willingness to consider reversing its decision to relocate the assembly operation, if only the union would concede, to regain § 8(a)(5) jurisdiction it lost in *First Nat'l Maintenance,* by the finding that "economic factors unrelated to labor costs" were conditions Eltec could cope with. "16a". Yet, whether Eltec could cope, is precisely the question reserved for management to make, not the Board. By allowing the union the opportunity to introduce a last-minute good faith proposal to work against Eltec in this manner, the Board dramatically changes management's decision from a permissive to a mandatory subject of bargaining.

Chairman Dotson's dissent is illuminating for it demonstrates the enormous effect the decision bodes for the nation's

employer's. Recognizing that "labor costs" were admittedly considered as part of the decision of the company in this case, he refused to find that the decision to transfer the assembly operation was based solely upon it.

> Thus, the *Respondent's willingness to confer* with the Union *regarding* that, from all appearances, would affect *the entire unit does not establish that the decision to transfer and subcontract the parts assembly operation turned upon labor costs in that operation.* To decide otherwise might discourage employers from voluntarily conferring with their employees' collective-bargaining representative regarding permissive subjects of bargaining, particulary when an employer engages in such actions as part of an attempt to salvage a failing operation.

38a.

But, such is what the Board decided.

Hence, the message the Board sends to employers under its unfair labor practice review proceedings, is not to engage in any concession bargaining with a union in order to ameliorate the effects of poor business conditions, but to strike out independently without consideration of employee interests, in order to protect the business from the possibility that the Labor Board might later find the conference with the union an admission that "labor costs" are involved in the decision, and prolonged bargaining therefore required. [4] As Chairman Dotson also explained in his dissent, the sale of the parts assembly operation was inescapably a change in the nature and direction of the business.

> By subcontracting one of its two major operations, the respondent was attempting to restore the enterprise to economic viability, a prospect threatened by rapidly diminishing sales in a depressed industry, abnormally high interest expenses, non competitive

[4] *See First Nat'l Maintenance*, 452 U.S. at 685, where the Court expressly noted the difficulty an employer would experience in determining the time at which the duty to bargain with the union would arise or cease and the Board's *post hoc* review.

> wages, and an unfavorable business environment resulting from higher taxes.

36a.

The situation of Eltec represented here is also the same as the company in *First Nat'l Maintenance*, as there is no allegation that Eltec's actions were motivated by anti-union animus. "37a n. 2". This is reminiscent of the situation confronted by the Board in allowing mid-term sub-contracting of unit work to proceed after impasse, the question resolved in *Milwaukee Spring Div.*, 268 N.L.R.B. 601 (1984), *aff'd sub nom., Auto Workers v. NLRB*, 765 F.2d 175 (D.C. Cir. 1985), and decided not to be a mandatory subject of bargaining.

The enormity of the consequences for employers are also fully revealed in recent Board decisions in *Reece Corp.*, 294 N.L.R.B. No. 33, 131 L.R.R.M. 1413 (May 31, 1989) and *Parma Indus., Inc.*, 292 N.L.R.B. No. 9 (1988). In *Reece*, the Board in another 2-1 decision, Member Johanson dissenting, found that a company's decision to close its most costly facility and transfer the work to more productive plants, was found by the Board to involve "labor costs." Precisely because management had attempted to negotiate with the union for concessions and rule changes to operate more efficiently, the Board, using the *Otis Elevator* decision in its most extreme manner to date, faulted management for not continuing negotiations to impasse before taking action:

> Had the Respondent adequately responded to the Union's requests for financial information, it might either have achieved the concessions that would make the relocation unnecessary or, failing that, have reached an impasse that would render its subsequent implementation lawful. In light of its bargaining positions, however, it is unreasonable for the Respondent now to argue that the decision turned essentially on factors other than labor costs."

In the ivory tower occupied by the Board, it completely loses sight of the fact that a business must make money to

survive. If it cannot do so, then it must move quickly to satisfy its financial interests. To put the matter interminably before the union as a matter of bargaining, risks incessant delay as clearly explained by this Court in *First Nat'l Maintenance*. For the employer to forswear action until an impasse is reached, and allow the Board to examine the verity of a *post hoc* union claim of no impasse, a decision which will not likely be ruled upon for years, denies an employer of its most basic management rights to direct its business. Matters such as these must be made urgently and decisively.

As the Court also stated in *First Nat'l Maintenance*, the Congress never intended for labor unions to become partners in a business enterprise. The Board's decision here gives unions the right to control the timing of every decision of an employer to respond to exigent economic circumstances. *Compare Local 825, Int'l Union of Operating Engineers v. NLRB*, 829 F.2d 458 (3d Cir. 1987) and *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965) (demonstrating that the right to lock out to protect against the timing of a strike was within management's prerogatives). The importance of this issue to large and small businesses in this country requires the immediate attention of the Court.

CONCLUSION

For the reasons set out above, the Court should grant a writ of certiorari to the Sixth Circuit to review the question whether a decision to close a business is a mandatory subject of bargaining.

Respectfully submitted,

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June 26, 1989

APPENDIX TO PETITION

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

PLYMOUTH STAMPING DIVISION, ELTEC CORPORATION,
Respondent.

No. 88-5469

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Argued February 13, 1989
March 27, 1989, Decided and Filed

ON PETITION for Enforcement of an Order of the National Labor Relations Board.

Before: KENNEDY and JONES, Circuit Judges; and SILER, Chief District Judge.[1]

KENNEDY, *Circuit Judge.* The National Labor Relations Board, seeks enforcement of its Decision and Order against respondent, the Plymouth Stamping Division of the Eltec Corporation, finding that respondent violated Sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and (5), by failing to give Local 985, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) adequate notice and a meaningful opportunity to bargain over respondent's decision to transfer and

[1] The Honorable Eugene E. Siler, Jr., Chief United States District Judge for the Eastern District of Kentucky and United States District Judge for the Western District of Kentucky, sitting by designation.

subcontract its parts assembly operation. On appeal, respondent argues that its decision to transfer the parts assembly operation was not a mandatory subject of bargaining and, alternatively, that the company's efforts to discuss the matter with the union, both pre- and post-transfer, satisfied its obligation to bargain in good faith. We find the decision of the Board to be supported by substantial evidence and in accordance with law and therefore affirm the Board's decision in all respects.

Respondent manufactures and sells automotive parts and related products in Plymouth, Michigan. The Union is the exclusive collective-bargaining representative of respondent's production and maintenance employees. Sometime in 1977, respondent began to experience serious financial problems as a result of a downturn in the automotive industry as a whole. According to respondent, sales continued to deteriorate in its manufacturing operations to the point where respondent decided to investigate contracting out its assembly operations. Ultimately, respondent's management decided subcontract its parts assembly work to another company to be located in Wauseon, Ohio.

On February 11, 1960, respondent notified the Union's bargaining committee of its plans to subcontract. This notification came in the form of a letter advising: (1) that respondent would terminate its parts assembly operation at the conclusion of the second shift on Friday, February 15, 1980; (2) that assembly operation employees would either be transferred or laid off; and (3) that the action was necessary "due to economic and business reasons." The Union thereafter requested a meeting which was held on February 14, 1980.

During the February 14 meeting, respondent informed the Union that plant-wide layoffs would occur based on seniority. Respondent's Vice-President and General Manager Richard Taylor explained that respondent's economic decline resulted from a number of factors including declining sales, noncompetitive wage rates for parts assembly, overly burdensome Michigan taxes and high workmen's compensation

costs. According to the testimony of several bargaining committee members, in response to a question concerning possible action to retain the assembly jobs, respondent stated that the Union would have to accept substantial wage cuts, a cost of living freeze, a reduction in some benefits and work rule modification. The Union requested that respondent delay any action until the Union's President returned from vacation the following week. Respondent stated that its decision was not final; however, for economic reasons it requested a reply from the Union by the next day (Friday, February 15) as to whether or not the Union would consider granting concessions.[2]

The Union failed to respond to respondent's request on Friday. Over the weekend of February 16 and 17, respondent moved its parts assembly equipment to Ohio at a cost of approximately $13,000.00. Unbeknownst to respondent, the Union, in a letter dated February 14, had requested information regarding the specifics of respondent's decision. Respondent received the letter on February 20.

On March 11, respondent replied to the Union's letter of February 14 stating that respondent's plans, although continuing, were not "finalized" in the sense of being irreversible and that it was prepared to discuss the matter with the Union. Respondent, in addition to reiterating its other reasons for the decision to subcontract, further stated that it had terminated assembly operations because "assembly operations are labor intensive and the costs (wages/benefits) associated with supporting this labor group have made the company non-competitive."

On March 1, respondent entered into a formal agreement leasing its assembly equipment to the Ohio company. Respondent retained a right to terminate the lease and repossess

[2] The Board maintains that respondent's February 14 request was an ultimatum requiring final agreement to substantial wage and benefit reductions on 24 hours notice. Given our conclusion below, however, we accept respondent's contention that it sought only an indication of the Union's willingness to consider respondent's request for concessions and not a binding commitment.

the equipment. Respondent also retained its customers' purchase orders in order to maintain quality control. Pursuant to an option in the lease agreement, the Ohio company purchased the equipment from respondent on July 1 for $132,430.00.

A three member panel of the Board, with one member dissenting, found that respondent had violated the Act. Applying Board precedent, the panel found respondent's decision to transfer its parts assembly operation to be a subject of mandatory bargaining because the decision "turned upon labor costs . . . and not . . . upon a fundamental change in the nature of the Respondent's business." The panel further found no merit to respondent's argument that its offers to bargain either pre- or post-transfer in fact offered the Union a reasonable opportunity to bargain. The Board now seeks enforcement.

Collective bargaining is an essential "method of defusing and channeling conflict between labor and management" in an effort to maintain industrial peace and preserve interstate commerce. *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 674 (1981). To this end, Congress has vested power in the Board to declare certain actions by unions and employers unfair including a failure "to bargain collectively." See 29 U.S.C. §§ 153 & 158 (1982). Despite the importance of give and take between management and labor on many issues, Congress has required mandatory bargaining on matters concerning only " 'wages, hours, and other terms and conditions of employment.' " *First Nat'l*, 452 U.S. at 674 (quoting 29 U.S.C. § 158(d)). A refusal to bargain over a proper subject of mandatory bargaining violates the Congressionally created duty and may be remedied by Board order. NLRB v. Katz, 369 U.S. 736 (1962).

Congress deliberately used the somewhat vague phrase "conditions of employment" in defining mandatory bargaining subject matter to allow the Board substantial latitude to define the scope of mandatory bargaining in light of industrial realities and practices. *First Nat'l*, 452 U.S. at 675. Because

Congress vested the Board with primary responsibility for determining whether bargaining subjects are "terms and conditions of employment," the Board's decision as to exactly which disputes are mandatory bargaining subjects is entitled to "considerable deference." *NLRB v. Production Molded Plastics, Inc.*, 604 F.2d 451, 453 (6th Cir. 1979) (quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495 (1979)). Despite the breadth of the phrase "conditions of employment," Congress did not intend to mandate bargaining over every conceivable issue arising between management and labor. "The National Labor Relations Act does not say that the employer and employees are bound to confer upon any subject which interests either of them; the specification of wages, hours, and other terms and conditions of employment defines a limited category of issues subject to compulsory bargaining." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 220 (1964) (Stewart J., concurring). Certain subjects, "such as choice of advertising and promotion, product type and design, and financing arrangements," affect the conditions of employment only indirectly and are not decisions which management must discuss with labor. See *First Nat'l*, 452 U.S. at 676-77. On the other hand, certain decisions, "such as the order of succession of layoffs and recalls, production quotas, and work rules," are at the core of the employer-employee relationship properly subject to mandatory bargaining. Id. at 677.

An area of uncertainty exists, however, between those issues which may be classified as clearly either managerial decisions or conditions of employment. A guideline to follow in this grey area is "whether requiring bargaining over this sort of decision will advance the neutral purposes of the Act," *First Nat'l*, 452 U.S. at 681, namely promotion of labor-management relations and the collective-bargaining process without unduly burdening management's right freely to choose the "basic direction of a corporate enterprise." *Fibreboard*, 379 U.S. at 223 (Stewart, J., concurring). Thus, while every decision affecting job security is not a subject of

compulsory collective bargaining, neither is every decision motivated by a concern for economic profitability beyond the scope of the duty to bargain.

The Supreme Court has articulated a standard for determining whether a decision is the subject of mandatory bargaining. The Court has stated that "in view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business." *First Nat'l*, 452 U.S. at 679. Of particular importance is "[t]he appropriateness of the collective bargaining process for resolving [the issue in question]," *Fibreboard*, 379 U.S. at 214, and the extent to which collective discussions between the parties might have resulted in a change in the employer's decision. See *NLRB v. Westinghouse Broadcast and Cable, Inc.*, 849 F.2d 15, 23 (1st Cir. 1988) (bargaining with the union could have affected employer's decision to eliminate bargaining unit).

The process of balancing labor's understandable concern with any decision which may affect job security and management's concern with maintaining entrepreneurial control and flexibility of decisionmaking necessarily requires that the decision whether mandatory bargaining should take place turns upon the particular set of facts presented in the individual case. *See, e.g., NLRB v. Acme Indus. Prods., Inc.*, 439 F.2d 40, 42 (6th Cir. 1971). The Supreme Court has found several facts significant in determining the propriety of collective negotiation concerning the decision to subcontract work. These facts are: (1) whether the decision has altered the company's "basic operation;" (2) whether the decision contemplated substantial capital investment; and (3) whether imposing a bargaining requirement would "significantly abridge" the employer's "freedom to manage the business." Fibreboard, 379 U.S. at 213. An essential fact is whether labor problems contributed to the employer's decision to

subcontract—such a connection indicates "that collective bargaining in advance of the decision might have produced a union offer which could have affected the decision to transfer the jobs." *Production Molded Plastics*, 604 F.2d at 453.

Applying the above standard to the facts of this case, we believe substantial evidence supports the Board's conclusion that respondent's decision to subcontract its parts assembly work was properly a subject of mandatory bargaining. First, respondent's transfer of the parts assembly work did not significantly alter the nature of respondent's business. Until the leased machinery was sold to the Ohio company on July 1, respondent could terminate the lease, return the machinery, and recall the workers; in fact, respondent indicated its willingness to do so. Moreover, as the Board observed, respondent retained the purchase orders for the parts work in order to continue monitoring quality control and retain customers. Second, respondent incurred no significant capital expenditures until the parts assembly machines were sold to the Ohio company for $ 134,000.00. Although respondent incurred $ 13,000.00 in moving expenses, this Circuit has previously held that "[t]he transfer of some machinery and 15 jobs" did not represent a major commitment of capital sufficient to implicate the transferring employer's overall business scope or direction. *See Production Molded Plastics*, 604 F.2d at 453. As in *Production Molded Plastics* respondent's decision to subcontract the parts assembly work did not commit respondent to a new enterprise nor signify any permanent withdrawal from a previous line of business at least until the sale of the equipment on July 1.

Third, and from our perspective most significant, is the proof that problems concerning the "conditions of employment" were motivating factors behind respondent's decision to subcontract the parts assembly work. Respondent's disclosure of the transfer occurred shortly after an unsuccessful attempt to negotiate economic concessions from the Union in August and September of 1979. Respondent stated at the

February 14 meeting with the Union that it would not subcontract the parts assembly work if the Union would agree to certain concessions. Even after the move, respondent, through outside counsel, repeatedly stated its willingness to move the equipment back from Ohio. Finally, Vice-President and General Manager Taylor testified that if the Union had been willing to negotiate concessions the parts assembly operation would not have been moved. Thus, respondent's decision to subcontract the parts assembly operation was motivated by a dispute concerning conditions of employment and respondent's actions can be characterized as a unilateral act frustrating negotiation on the underlying questions of [the requested economic concessions], and so an evasion of its duty to bargain on these questions, which are concededly subject to compulsory collective " *Fibreboard*, 379 U.S. at 225 (Stewart, J., concurring). *See also Otis Elevator Co.*, 269 N.L.R.B. 891, 892 (1984) (critical factor in determining whether a management decision is subject to mandatory bargaining is "the essence of the decision itself, i.e., whether it turns upon a change in the nature or direction of the business, or turns upon labor cost") (plurality opinion)[3].

Respondent maintains that even if the decision to move the parts assembly operation to Ohio was a subject of mandatory bargaining, respondent nevertheless offered the Union a

[3]Respondent argues that it was relieved of any duty to bargain because the Union failed to respond quickly to respondent's demands for concessions and because little hope existed for an agreement given the Union's previous refusal to consider economic concessions in the preceding months. Respondent's duty to bargain on this issue is not negated by the possibility or even the substantial probability that the Union would not agree to respondent's proposed economic concessions. The purpose of the duty to bargain is to give the collective bargaining process a chance to operate regardless of the possibility of success. To hold otherwise would allow employers and unions to skip the bargaining stage altogether based upon their own perceptions regarding the low probability of reaching an agreement. Only upon receiving a definitive rejection or bargaining to impasse may the employer abandon the bargaining process and unilaterally implement its decision. The Union, of course, retains its right to strike in this situation. See First Nat'l, 452 U.S. At 675 (citing NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 72 S.Ct. 824, 96 L.Ed. 1027 (1952)).

full opportunity to bargain both before and after the February 16 move. The Board's finding that it did not is supported by substantial evidence. Even assuming that respondent's proposal of February 14 simply sought an indication of the Union's willingness to discuss economic concessions, this 24-hour ultimatum placed the Union in an untenable position. Its President and principal bargaining representative was out of town and the Union had insufficient information concerning the actual need for such concessions. Respondent contends that the Union had at least five business days from the time it first learned of the proposed move in which to negotiate with respondent. This argument, however, ignores the fact that the February 11 notice took the Union by surprise and the first date at which a meeting could be held with respondent's attorney present was three days later on February 14. The Board was justified in concluding that respondent hadn't seriously intended to bargain before moving, when it waited until February 11 to announce its plans to move, plans it began to formulate in December and January. The Board was entitled to find a notice of five business days was insufficient time to allow a meaningful exchange under all the circumstances here. *Cf. NLRB v. Borg Warner Corp.*, 663 F.2d 666, 668 (6th Cir; 1981), *cert. denied* 457 U.S. 1105 (1982) (two days notice insufficient).

We agree that the Board could find that respondent's offers to bargain after the February 16 move similarly did not satisfy its obligation to bargain. "The Union must be given a chance to discuss the specifics of any proposal before it is implemented." *Peerless Roofing Co. v. NLRB*, 641 F.2d 734, 735 (9th Cir. 1981). If employers could, as a matter of law, satisfy their duty to bargain through post-implementation offers, then they could unilaterally cut wages and bargain afterwards with promises to restore wages at some future point in time. This power would subvert the bargaining process ab initio.

For the foregoing reasons, we grant enforcement of the Board's order.

PLYMOUTH STAMPING DIVISION, ELTEC CORPORATION and LOCAL 985, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW)

Cases 7-CA-17416, 7-CA-19179

NATIONAL LABOR RELATIONS BOARD

November 19, 1987

By Wilford W. Johansen, Member; James M. Stephens, Member; Donald L. Dotson, Chairman.

OPINION: On 3 December 1982 Administrative Law Judge Elbert D. Gadsden issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[4] and conclusions only to the extent consistent with this Decision and Order.

1. The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to give the Union adequate notice and a meaningful opportunity to bargain over its decision to transfer and subcontract its parts assembly operation. Contrary to our dissenting colleague, and for reasons set forth below, we agree with the judge that the Respondent violated the Act as alleged.[5]

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[4] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[5] The consolidated complaint contains no allegations that the Respondent unlawfully failed or refused to bargain with the Union concerning the effects of its decision to subcontract its parts assembly operation.

In *Otis Elevator Co.*, 269 NLRB 891 (1984), decided under the guidance of the Supreme Court's opinion in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), the Board, in the plurality opinion of Chairman Dotson and Member Hunter, stated that the critical factor in determining whether a management decision is subject to mandatory bargaining under Section 8(d) is "the essence of the decision itself, i.e., whether it turns upon a change in the nature or direction of the business, or turns upon labor cost; not its effect on employees nor a union's ability to offer alternatives." Id. at 892 (Emphasis in original.) We find that the decision at issue here was subject to mandatory bargaining under any of the views expressed in *Otis Elevator*, including under the analysis set forth in the plurality opinion. We base this finding on our conclusion that the decision turned upon labor costs within the meaning of Otis Elevator, and not, as argued by our dissenting colleague, upon a fundamental change in the nature and direction of the Respondent's business.[6]

The Respondent engages in the stamping, sale, and distribution of automotive parts and related products in Plymouth, Michigan. Since about 1960, the Union has been the exclusive collective-bargaining representative of the Respondent's production and maintenance employees. The parties' most recent collective-bargaining agreement was effective from 1 September 1977 to 1 September 1980.

Commencing about 1977 the Respondent experienced serious financial problems. As a result, in August 1979, the Respondent sought midterm economic concessions involving wages, COLA, and health benefits as part of its "Company Economic Survival Proposals." When the parties failed to

[6] The judge referred to the Respondent's actions interchangeably as a decision to transfer and subcontract its parts assembly operation and as a decision to terminate that operation. As the Board emphasized in Otis Elevator, the appellation attached to a decision is not determinative concerning whether an obligation to bargain exists. Accordingly, for the purpose of consistency, we will refer to the Respondent's decision as one to subcontract its parts assembly operation.

reach an agreement on the requested concessions, the Company withheld the COLA due 10 September 1979 and put a "wage moratorium" into effect. The Union immediately grieved the matter and won relief from the Respondent's action.

On 11 February 1980 [7] the Respondent met with the Union's bargaining committee and gave written notice that, due to business and economic reasons, it planned to terminate its parts assembly operation on Friday, 15 February. The parts assembly division constituted one of the Respondent's two major operations, employing about 25 of approximately 75 total employees. The notice further provided that employees assigned to the affected division would be transferred or laid off according to the collective-bargaining agreement. The notice concluded with the statement, "We are prepared to discuss this matter with you further." On learning of the Respondent's plans, the Union requested a meeting with the Company and its attorney, which meeting the Company advised could not be scheduled until 14 February.

During the meeting held on 14 February, the Respondent informed the Union that the layoffs would be plantwide, based on seniority. Either during that meeting or immediately afterwards, the Respondent gave the union representatives a "Notice" listing 24 employees who were to be placed "on indefinite layoff" at the end of their 15 February shift. The notice stated that the layoff was "due to the termination of assembly operations at Plymouth Stamping, effective at the end of the afternoon shift on Friday, February 15, 1980." At the 14 February meeting, Vice President Taylor explained that the Company's economic problems resulted from a 25-percent decline in sales, noncompetitive wage rates and benefits for parts assembly employees, burdensome Michigan business taxes, and high workmen's compensation and unemployment taxes. When the Union asked what could be done to keep the parts assembly jobs in-plant, the Respondent indicated that it would need substantial wage reductions, a

[7] All dates refer to 1980 unless otherwise indicated.

freeze on COLA's, reduced health benefits, a decrease in paid holidays, changes in the grievance procedure, and relief from various work rules. The Respondent insisted on a response regarding the economic concessions by 15 February. The Union argued that that was not possible as the parties had discussed concessions in August 1979 and the Respondent had never opened its books. When the Union questioned whether the decision regarding the move was final, the Respondent stated its decision was not irreversible but maintained that, for economic reasons, it needed an answer by the next morning. The Union requested a delay until 18 February (the following Monday) to allow its president to return to the area and to hold a scheduled membership meeting. After such consultations, the Union stated it would get back to the Respondent's representatives.

In a letter dated 14 February, received by the Respondent on 20 February, the Union requested information regarding the specifics of the Respondent's decision. In the meantime, on 15 February, the Respondent's attorney, not having heard from the Union, advised the Respondent to proceed with the move. The parts assembly equipment was moved on 16 and 17 February to Stamtec Corporation in Ohio, 90 miles away. The move cost $14,000.

When asked at the hearing what plans the Respondent made prior to February 1980 regarding its parts assembly operation, Taylor responded that, after deciding to subcontract the work, the Respondent commenced negotiations for a building space lease in Wauseon, Ohio, in late 1979 and early 1980. In mid-January, Stamtec was incorporated and a lease agreement was consummated.[8] Advertisements for jobs at the new location appeared 12 February. Taylor further testified that, prior to the equipment transfer, a 2-week

[8] Taylor was a 38-percent stockholder of Stamtec. Although Taylor had no ownership interest in the Respondent, the record shows that corporation was owned by Taylor's father. The parties stipulated at the hearing that the Respondent and Stamtec were separate and distinct companies. There is no evidence that Stamtec was formed for any purpose other than to perform parts assembly work.

"stockpile" of completed parts was manufactured to assure continuity of supply to the Respondent's customers while Stamtec geared up for production.

Despite the prior arrangements, the Respondent's 11 March response to the Union's 14 February letter stated that the Company's plans did not become final until 15 February and that finalization was prompted by "outside commitments" and the fact that the "Company had not received any affirmative response from the Union pursuant to the meetings on Monday, February 11 and Thursday, February 14." The letter further stated that although the Company was proceeding with its plans, its decision was not "finalized" in the sense that it was irreversible nor in the sense that the Company was unprepared to consider other alternatives. In this regard, the letter continued, the "Company has been fully prepared to discuss this matter with the Union, and remains available to do so." In addition, the letter reiterated the reasons for the removal of the parts assembly operation. Regarding labor costs, the letter stated: "The assembly operations are labor intensive and the costs (wages/benefits) associated with supporting this labor group have made the Company non-competitive in bidding on existing and future projects. . . . [T]he Company has attempted to alleviate this problem through automation in the past."

During the hearing, the parties entered into a stipulation stating in part that, "the parts assembly operations performed at Plymouth Stamping . . . and . . . terminated on February 16, 1980, have been contracted out to the Stamtec Corporation." On 1 March the Respondent and Stamtec formally entered into an "Equipment Lease and Option to Purchase" agreement under which Stamtec leased from the Respondent the equipment transferred to its location in February. According to the agreement: "It is understood between the parties that the equipment subject to this lease is intended to be used by Stamtec in the production of stampings and other parts for Eltec at Stamtec's production facilities . . . under subcontract for customers for Eltec. . . ."

In the event of default by Stamtec, the Respondent retained the right to terminate the lease and repossess its equipment. The Respondent acknowledged that it retained the purchase orders for the parts assembly work to monitor quality control and retain customers. The agreement also provided that as of 1 July, Stamtec had the option to purchase the leased equipment.

Analyzing the above facts in light of the plurality opinion in Otis Elevator, we find that the General Counsel established that the Respondent's decision turned upon labor costs. Thus, the first announcement of the Respondent's plans to subcontract its parts assembly operation came on the heels of unsuccessful attempts to obtain economic concessions from the Union. Further, the Respondent admitted when it met with the Union on 14 February that its decision was based on specific enumerated factors, including labor costs. The level of importance the Respondent attached to labor costs was made clear at that meeting when the Respondent stated that the Union's agreement to substantial wage reductions, a freeze on COLA's, reduced health benefits, a decrease in paid holidays, changes in the grievance procedure, and relief from various existing work rules would keep the parts assembly jobs in the plant.[9] Further, even after moving the parts assembly equipment, the Respondent informed the Union on several occasions preceding the sale of the equipment on 1 July that the decision was neither final nor irrevers-

[9] Our dissenting colleague attempts to justify his failure to attach any significance to the 14 February meeting by finding that "neither the exact contents of the parties' exchanges nor the precise nature of the concessions is entirely clear. From all accounts, concessions appear to have been discussed only in vague, general terms." Nevertheless, no matter how general the parties' discussion, it cannot be denied that the concessions demaded by the Respondent to keep the parts assembly operation in-plant fell squarely within the catergory of labor costs.

We also note that the Respondent did not merely state, without any commitment, that it would consider the Union's proposals, but explicitly affirmed that appropriate bargaining concessions would result in the parts assembly operations being retained. An ambiguity regarding the full scope of such concessionary bargaining is inadequate to rebut the General Counsel's showing that the decision in fact "turned upon" labor costs.

ible, that it was prepared to discuss alternatives, and that it had the ability to secure the return of the equipment. These facts lead us to conclude that had the Respondent obtained the specific cost concessions it desired, it would not have transferred its parts assembly operation despite the considerable arrangements previously made to effect the transfer. We find this conclusion supported by the Respondent's statements on 14 February and thereafter that the move was not irreversible, by the temporary nature of the initial arrangement, and by the repeated assertions that the equipment could be returned. Further, although the Respondent also cited economic factors unrelated to labor costs as reasons for its actions, it in essence conceded that it could cope with these adverse factors if concessions were granted. This case is therefore distinguishable from Inland Steel Container Co., 275 NLRB 929, 936—937 (1985), enfd. sub nom. Steelworkers Local 2179 v. NLRB, 822 F.2d 559 (5th Cir. 1987), where the employer's plant relocation decision turned primarily on the need to replace an obsolete and deteriorating plant facility to solve serious quality control problems that were injuring the employer's business.

Consistent with our ruling above, we disagree with our dissenting colleague's position that the Respondent's action represented a "significant change in operations" so as to fall outside the scope of mandatory bargaining. Clearly, inherent in any subcontracting situation are "changes," the most common of which is that the original employees might no longer perform the subject work. However, the Board recognized in Otis Elevator that the act of subcontracting does not automatically signify a change in the nature or direction of an enterprise that exempts the decision from mandatory bargaining. Thus, we find here that from 15 February until the parts assembly equipment was sold on 1 July,[10] the Respondent subcontracted the subject work in a manner which did not significantly alter the Respondent's business.

[10] This limitation on the duration of the unlawful conduct is explained below in the amended remedy section.

Both before and after 15 February the Respondent engaged in the business of performing parts assembly work for its customers. In fact, a stockpile of assembled goods was prepared specifically to avoid a break in continuity to existing customers. Although the parts assembly work was performed by Stamtec employees, the Respondent retained both its customers' purchase orders and the right of quality control. Further, by retaining ownership rights to the equipment leased to Stamtec, the Respondent was not required to engage in a substantial capital restructuring. As above, we note also the temporary nature of the initial arrangement between the Respondent and Stamtec and the repeated representations that the equipment could be returned.

Accordingly, we find that the Respondent's decision to subcontract its parts assembly operation turned upon labor costs within the meaning of the plurality opinion in Otis Elevator. Indeed, as stated above, we find that the Respondent's decision was subject to mandatory bargaining under any of the views expressed in that case.[11] Thus, on the basis

[11]In Otis Elevator, former Member Dennis established a two-step test for use in determining whether a certain management decision is a mandatory subject of bargaining: [T]he General Counsel must prove (1) that a factor over which the union has control was significant consideration in the employer's decision, and (2) that the benefit for the collective-bargaining process outweighs the burden on the business. The burden elements to be considered in applying the second part of the test include: extent of capital commitment; extent of changes in operations; and the need for speed, flexibility, or confidentiality. In the instant case, the facts clearly show that labor costs (a factor over which the Union has control) were a significant factor in the Respondent's decision. Addressing the burden elements, the facts establish that the Respondent's decision to subcontract did not involve a substantial capital commitment and did not depend on a need for confidentiality. Concerning flexibility, the Respondent remained willing, even after incurring some $14,000 in moving expenses, to consider alternatives to the subcontracting plan. Further, the Respondent's postmove statements that the decision was not irreversible show that, while the Respondent sought a rapid response to its concession proposals on 14 February, the factor of speed was not an obstacle to resolution through bargaining. Accordingly, under former Member Dennis' view, it would appear that the benefit derived from the bargaining process in this case outweighed the burden bargaining would have imposed on the Respondent in the operation of its business.

of this analysis of the facts we affirm the judge's conclusion that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to afford the Union a reasonable opportunity to bargain about the decision affecting its parts assembly division.[12]

2. The judge found that since about 15 December the Respondent engaged in surface bargaining in violation of Section 8(a)(5) and (1) of the Act, that the Respondent's failure to bargain in good faith converted the economic strike commenced by the Union on 9 September into an unfair

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Former Member Zimmerman stated in Otis Elevator that he wouldfind bargaining over an employer's decision to relocate work to be mandatory when the decision is amenable to resolution through collective bargaining. He further stated that a decision may be amenable to resolution through bargaining where the decision is related to overall enterprise costs not limited specifically to labor costs. Here, the Respondent's repeated attempts to obtain substantial concessions demonstrate that the Union could reasonably have been expected to respond to the Respondent's concernsand alter the Respondent's decision.

[12] We find no merit in the Respondent's claim that it in fact offered the Union a reasonable opportunity to bargain over this decision. Its 24-hour ultimatum, delivered on 14 February, that the move would go forward unless the Union was willing to agree to "substantial" cuts in wages and benefits was not a reasonable offer to bargain, even assuming, as the Respondent contends, that it was not asking that the nion give it specific final figures on 15 February. As noted, the nion's president and principal bargaining representative was out of town, and the other union representatives not unreasonably wished to consult him and to obtain some more information from the Respondent about the need for such substantial concessions at that point. Te record makes clear that the Respondent was itself in posession of facts that would have made it possible to give the Union earlier notice of its intent to subcontract the parts assembly operation.

The respondent's offers to bargain about the decision after it had moved out the machinery and laid off employees similarly do not satisfy the bargaining obligation. *See Metropolitan Teletronics Corp.*, 279 NLRB No. 134 (1986), slip op. at 8—9, enfd. per curiam 819 F.2d 1130 (2d Cir. 1987) (offer to bargain over effects of a decision not meaningful if made after the decision has been implemented). If the Respondent were correct in its argument that its postimplementation offers to bargain were sufficient because the action in question was "reversible," then employers would be free to cut wages and bargain afterwards on the theory that they might agree to restore the wage cuts after bargaining. We know of no authority for the proposition that such after-the-fact bargaining satisfies the statutory bargaining obligation.

labor practice strike, and that the strikers were entitled to full reinstatement rights. We find merit in the Respondent's exceptions to these findings and, for the following reasons, reverse the judge's conclusions.[13] The pertinent facts are set forth below.

On 15 August the parties commenced negotiations for a new collective-bargaining agreement to succeed the one due to expire 1 September. Between 15 August and 12 March 1981, the parties conducted approximately 24 bargaining sessions, eight of which were attended by a Federal mediator.[14] During this period the Respondent presented six written proposals whereas the Union presented two.[15] On 8 September the parties executed a document entitled "Memorandum of Agreement (Non-economic Items)," confirming their agreement on such matters as temporary transfers, attendance control, and employee files, and indicating that "all other non-economic issues are resolved.[16]" Despite this agreement, the union membership voted that evening to reject the Respondent's latest proposal and to commence strike activities the following day.

The judge found that the parties engaged in hard bargaining between 28 August and 4 December, but that after

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[13] The consolidated complaint alleges that the Respondent's bad-faith bargaining, commencing about 15 December, converted the employee's strike into an unfair labor practice strike. Accordingly, because it was neither allegenor litigated, we find it nnecessary to determine whether the Respondent's earlier unlawful failure to bargain in good faith regarding its decision to transfer and subcontract its parts assembly work impacted on the employees' strike.

[14] The Federal mediator attended the sessions held on 23 September, 21 and 27 October, 25 November, and 4 December 1980, and 15 January, 26 February, and 4 March 1981. The latter two sessions were also attended by a state mediator.

[15] The Respondent's proposals were dated 15 August, 25 August, 5 September, 5 November, and 15 December 1980, and 12 March 1981. The union proposals were presented 15 August 1980 and 26 February 1981.

[16] By 4 September the Respondent had withdrawn several of its original proposals including those seeking a 4-day workweek and changes in layoff and overtime equalization procedures.

15 December the Respondent engaged in surface bargaining without a good-faith intent to reach agreement. The judge concluded that the Respondent reneged on items previously agreed to, constantly changed its bargaining proposals without offering substantiated reasons or justification, offered no probative financial data to support its claims of deteriorating business conditions, and failed to make any significant concession (with the exception of a qualified concession regarding amnesty for striking employees). Our review of the record reveals insufficient evidence to support the judge's findings.

We note at the outset that Section 8(d) of the Act requires an employer to meet at reasonable times with the representative of its employees and confer in good faith with respect to wages, hours, and other terms and conditions of employment. However, as the Board has frequently stated, "[I]t must be remembered that Section 8(d) does not 'compel either party to agree to a proposal or require the making of a concession . . . .' Thus, the Board does not, 'either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements,' "[17] absent unusual circumstances not present here.[18] In determining whether a party has negotiated in good faith, it is necessary to scrutinize the totality of its conduct. Regarding a party's conduct during negotiations accompanied by strike activities, the Board has stated, "While a company's change of negotiating posture may be evidence of bad faith, the total circumstances must be considered. Where an employer's economic power increases through the successful weathering of a striker, it is not unlawful for the

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[17] *Chevron Chemical Co.*, 261 NLRB 44, 46 (1982), citing *NLRB v. American National Insurance Co.*, 343 U.S. 395, 404 (1952); see also *Barry-Wehmiller Co.*, 271 NLRB 471, 472 (1984).

[18] *Chevron*, supra at 46 and fn. 6, 10. Chairman Dotson would not in any event attempt to evaluate the reasonableness of a party's bargaining proposals. *Allbritton Communications*, 271 NLRB 201, 205 fn. 13 (1984), *enfd.* 766 F.2d 812 (3d Cir. 1985), cert. denied 106 S.Ct. 850 (1986). *Accord: Struthers Wells Corp. v. NLRB*, 721 F.2d 465, 470 (3d Cir. 1983).

employer to use its new-found strength to secure contract terms that it deems beneficial."[19]

We find the Respondent engaged in hard but lawful bargaining and that any stiffening of its bargaining position during the course of negotiations reflected its then current economic condition and its ability to survive the Union's strike. Crucial to these findings are the negotiation sessions held after 15 December. However, because certain facts need clarification and others were overlooked by the judge, we find it necessary here to examine a number of earlier bargaining sessions. In addition, a review of the Respondent's wage and medical insurance proposals is required because our analysis of the facts differs from that of the judge, who in large part relied on his evaluation of these proposals in reaching his conclusions.

Since at least 1977, the Respondent has been plagued by economic difficulties. When negotiations commenced, its financial condition was critical. The Respondent's financial problems largely resulted from a deepening automotive recession characterized by plummeting sales. According to the Respondent's financial reports, it experienced in fiscal 1980[20] a $1.9 million downturn in sales volume, or about a 25-percent drop compared with its already reduced sales levels of the preceding year.[21] The Union's internally prepared auditor's report of 26 August, based on financial data provided by the Respondent, summarized the Company's economic situation as follows: "Eltec sustained moderate to heavy losses in three out of the last four fiscal years. . . . The losses have drained the company of working capital and forced it to rely increasingly on banks for financial support, leaving it top-heavy with debts and in a somewhat precarious financial position." The Union's report indicated that the

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[19] *O'Malley Lumber Co.*, 234 NLRB 1171, 1179—1180 (1978); *Pipe Line Development Co.*, 272 NLRB 48 (1984).

[20] The Respondent's fiscal year ends on 30 April.

[21] Interim financial statements reveal cumulative losses increasing from $189,572 on 30 September 1979 to $459,098 on 29 February 1980.

decline in sales was aggravated by high interest expenses and concluded, in assessing the company's prospects, that "it definitely needs higher (sales) volume to survive."

Indeed, long before preparation of the internal auditor's report the Union was aware of the Respondent's financial troubles. Numerous employees were laid off in 1978 due to production cutbacks resulting from a continuous decrease in customer orders. In the fall of 1979, the Respondent presented to the Union its "Company Economic Survival Proposals," in which it requested substantial plantwide wage and benefit concessions. Although the parties then discussed these proposals, no agreement was reached.

In its initial contract proposal of 15 August, the Respondent requested "significant" wage and fringe benefit reductions, amounting to approximately $3 per man hour in overall labor cost savings. The Union requested financial data to substantiate the Respondent's claim of economic hardship and, on 18 August, the Union was provided with audited financial statements and Federal income tax returns for the Respondent's fiscal years 1977, 1978, 1979, and 1980. On 25 August the Respondent also provided the Union with its interim financial statement of 30 June. The Respondent's 25 August proposal suggested a $3-wage reduction for production employees, 50 cents reduction for maintenance-skilled trade employees, and retention of current wages for toolroom employees. The proposal also indicated that if the Union agreed to reductions in other benefits, e.g., holidays, medical insurance, or pension contributions, the proposed wage reductions could be less, so long as the overall $3 labor cost reduction objective was met.

During the 3 September bargaining session, the parties thoroughly discussed the Company's economic condition, using as a basis for their discussions the aforementioned UAW auditor's report on 26 August. Although the report concluded that the Company was in a "somewhat precarious financial position," the Respondent, by correcting certain numerical inaccuracies in the report, revealed that its finan-

cial situation was considerably more bleak than indicated in that report. During the next few sessions, the Respondent decreased its proposed wage reduction for production employees. What is not clear in the judge's analysis, however, is that in making these "changes" the Respondent requested as an offset greater reductions in other benefits such that the Respondent's proposals were consistent at all times with its initial $3 target. On 8 September, as mentioned above, the union membership voted to reject the Respondent's proposals and to commence strike activities.

The Respondent continued its operation despite the strike, initially using supervisory personnel and family members to perform the duties of its striking employees. About 21 October, however, the Respondent informed the Union that it had begun to hire strike replacements. On 27 October the Union asked whether the Respondent would settle on its 5 September proposal, but the Respondent reminded the Union that that offer had previously been rejected. The Respondent further indicated that it had lost a substantial amount of business due to the strike, that it had to reexamine its bargaining position, and that its original $3 overall labor cost reduction proposal was "firm."[22] The Union requested that the Company prepare a new proposal. On 5 November, nearly 2 months after the strike began, the Respondent submitted a new wage proposal, again in line with its original

[22] The judge stated that the Respondent "stuck to its $3 reduction demand to get its rates competitive in the parts assembly operation." JD slip op. at 16. We note that this reference to the parts assembly operation, and other similar references, is inacurate because that work had not been performed by the Respondent since February, when that work was transferred to Stamtec Corporation in Wauseon, Ohio. The record shows, however, that the Respondent did mention a need for more competitive production rates and, based on this need, the Company consistently rejected the $1-" across-the-board" wage reduction the Union had offered since 8 September. Although the Respondent clearly indicated its position on this matter, the Union proposed its "across-the-board" reductions in the next few sessions.

$3 goal.[23] When the Respondent again informed the Union that certain changes were required due to a rapidly deteriorating financial condition, the Union requested documentary proof. On 7 November the Respondent furnished the Union with updated financial statements.

The record shows, contrary to the judge's findings, that the Union did not agree on 4 December to the Respondent's 5 November wage proposal, but instead proposed a $1.25-"across-the-board" reduction. At this meeting, and also on 25 November, the Respondent informed the Union that the 5 November proposal, which had not been agreed to, was no longer in effect and that the Company was interested in wage rates equivalent to those received by the strike replacements. When the Respondent further informed the Union that it desired to retain the replacements, the Union responded that the Company would have to change its position on that issue if it wanted an agreement. Despite the Union's knowledge that the 5 November proposal was "off the table," it unsuccessfully attempted to obtain partial agreement on that proposal at the 11 December bargaining session.[24]

The Respondent's proposal of 15 December did not represent an abrupt change in the Company's bargaining position, as argued by the General Counsel and impliedly found by the judge. The proposal, discussed in detail at the 15 January 1981 session, contained production wage rates which were the same as those discussed during the negotiation sessions held between 25 November and 11 December, maintenance-skilled trade rates which had remained unchanged since the 5 November proposal, and toolroom rates which

[23] Contrary to the judge's findings, the record establishes that the Respondent's 5 November proposal suggested a $2 wage reduction for production employees, $1 reduction for maintenance-skilled trade employees, and current wages for toolroom employees. According to the undisputed testimony of Respondent Attorney Hooth, these reductions, coupled with other labor cost-savings proposals, amounted to an overall $2.92 reduction.

[24] The Union also demanded on 11 December the termination of all strike replacements, a demand rejected by the Respondent.

reflected the Respondent's initial proposal. Regarding the increasingly important issue of replacements, the proposal offered amnesty for all striking employees who did not engage in picket line misconduct and demanded the right to retain replacements. As the Respondent argues, its 15 December proposal was consistent with its desire to obtain an agreement with which it could economically survive and which reflected its perceived strengthened bargaining position.

As found by the judge, the Union on 10 March 1981 agreed to the Respondent's 15 December wage proposal as modified in minor respects during the sessions of 26 February and 4 March 1981. The Respondent's last formal proposal, that of 12 March 1981, incorporated the parties' wage package agreement.

Our analysis of the facts establishes that the Respondent did not bargain in bad faith with respect to wages. At the outset of negotiations, the Respondent thoroughly reviewed the financial records forming the basis for its wage reduction proposals and throughout negotiations substantiated its claim of economic hardship by furnishing the Union with all requested financial data. The record also reveals that the Respondent's wage and fringe benefit offers, though "changing" in their composition, at all times were consistent with the Company's initially proposed $3 target. Finally, the facts show that the Union, at no time agreeing to an entire wage package, attempted on occasion to obtain agreement on proposals it knew had been withdrawn.

By 12 March, at which time negotiations effectively ceased, the parties had reached agreement on most disputed issues, including wages, cost-of-living adjustments,[25] optical insurance, random days, sick and accident disability insur-

[25] Although the Union on 28 August agreed to discontinuance of the COLA, it attempted on 21 October to obtain agreement to freeze the COLA for 1 year. On 12 November the Union again agreed to its discontinuation.

ance, life insurance,[26] holidays, vacation pay, pensions,[27] arbitration procedures and expenses, and the term of the contract. The outstanding issues were hospital and medical insurance and the right to retain replacements. Regarding insurance, an issue relied on in large part by the judge in reaching his conclusions, the record establishes that the Respondent proposed initially and until 5 November an MVF-1 plan with Master Medical, but with the deletion of drug and dental riders. Contrary to the judge, we find that the Union did not agree to this proposal on either 11 September or 12 November. Rather, on 12 November the Union demanded MVF-1 with the deletion of Master Medical but the inclusion of drug and dental riders. Throughout the remaining sessions, contrary to the judge's findings, the parties at no time reached agreement on this matter; the major area of disagreement involved drug and dental coverage. Both parties' proposals changed constantly, with the Respondent suggesting such options as MVF-3 with 50/50 copayments or $113 towards individual employee plans, and the Union suggesting various partial contributions towards drug and

[26] Although the judge mentions various dates, the record indicates that the issues of optical insurance, random days, sick and accident disability insurance, and life insurance were resolved on 11 September.

[27] The Respondent initially proposed a decrease in the amount of pension contributions. However, on 5 November the Respondent yielded to the Union's demand that current contribution rates be continued. The Respondent's 15 December proposal, although offering to contribute only on behalf of prestrike employees, did not alter the agreed-upon rates. In citing a portion of the General Counsel's brief, the judge included a reference to an "announcement" by the Respondent on 14 May 1981 that pension contributions would be suspended for 1 year. We note that the alleged comment was made outside the scope of negotiations while the parties were attending an injunction proceeding involving allegations of picket line misconduct. Further, it is unclear precisely what the statement was, to whom it applied, and whether any suspension was limited to the duration of the strike. Thus, we find the alleged statement of no probative value regarding the issue of bad faith. Further, we note that the judge failed to rule on an allegation in the complaint that about 14 May 1981 the Respondent unilaterally repudiated an existing obligation to maintain contributions to an employee pension fund. In the absence of exceptions, we find it unnecessary to rule on that complaint allegation.

dental riders.[28] After 15 January 1981, the subject of strike replacements undoubtedly became the major issue separating the parties.[29] By 10 March 1981, the parties' positions were firm: the Union stated there would be no agreement unless all strikers were granted amnesty and returned to work and the Respondent demanded the right to retain the replacements while granting the strikers amnesty and preferential hiring rights.

Reviewing the "totality of circumstances," we find that the Respondent engaged in lawful hard bargaining compatible with the economic realities confronting it. Further, the alleged substitution of regressive terms occurred here in the context of strike and picketing activities. As stated above, it is not unlawful for a party to take advantage of a shift in economic strength in order to seek more favorable contract terms.[30] The Respondent, prior to changing its proposals (all of which changes were explained in detail to the Union), assessed its economic situation in light of its ability to continue in operation. As noted in Hickinbotham Bros. Ltd., "A strike is a two-edged sword. Depending upon how it affects the employer's operations, the strikers may gain concessions or they may lose concessions previously obtained."[31] Although the judge appears to have viewed the Respondent's

[28] The Respondent's 15 December proposal did not offer an MFV-2 plan as found by the judge, but continued to propose an MVF-1 plan. Further, contrary to the judge, we find that the Union at no time agreed to relinquish drug and dental coverage.

We find insufficient evidence to support the judge's statement that on 12 May the Union agreed to choose between MVF-3 coverage or its equivalent. On the contrary, the record establishes that by letter dated 26 March 1981 the Respondent informed the Union that it could obtain insurance from carriers other than Blue Cross/Blue Shield at costs it planned to allocate for insurance purposes, but which would result in increased benefits. The parties thereafter met to discuss this development and the Respondent provided the Union with a description of a policy under consideration.

[29] At the end of December, the Respondent informed the strike replacements that they would be considered permanent employees.

[30] *Hickinbotham Bros. Ltd.*,254 NLRB 96 (1981); *Atlas Metal Parts Co. v. NLRB*, 660 F.2d 304 (7th Cir. 1981); *O'Malley Lumber Co., supra.*

[31] Hickinbotham, supra at 102.

reasons for changing its proposals as insufficient justification for its actions, we are not similarly persuaded. Again, as stated in Hickinbotham, "it is immaterial whether the Union, the General Counsel or [the judge] find these reasons totally persuasive."[32] What is important is whether they are "so illogical" as to warrant the conclusion that by offering them the Respondent demonstrated an intent to frustrate the bargaining process and avoid reaching agreement.[33] The judge did not conclude, nor do we, that the Respondent's proposals were so harsh, vindictive, or otherwise unreasonable as to conclude they were proffered in bad faith.[34] In sum, we find that the Respondent, having weathered the strike, was free to use its stronger bargaining position to obtain more desirable contractual terms.[35]

Apart from the proposals themselves, our conclusion that the Respondent fulfilled its bargaining obligation is supported by other evidence. In this regard, we note that the Respondent met regularly and frequently with the Union over a period of 7 months, reached agreement early in negotiations on all non-economic matters, furnished requested financial information, agreed to the presence and assistance of mediators, made numerous written and oral proposals and considered all union proposals, offered justification for its bargaining positions, and otherwise met its procedural obligations.[36] Accordingly, we dismiss the allegation that the Respondent violated Section 8(a)(5) of the Act by failing to bargain in

[32] Id. at 102—103.

[33] Id. at 103.

[34] *Chevron*, supra, 261 NLRB at 46 and fn. 10.

[35] The record shows, as outlined above, that many of the Respondent's proposals were not in fact "regressive" at all but rather were consistent with earlier offers.

[36] The Respondent excepted to the judge's finding that its attorney stated he was instructed to engage essentially in "take-away bargaining." As the Board noted in Allbritton Communications, supra, 271 NLRB at 206, "To lend too close an ear to the bluster and banter of negotiations would frustrate the Act's strong policy of fostering free and open communications between the parties." (Citations omitted.) We find that this alleged statement did not go so far asto belie the hard but real bargaining that accompanied it.

good faith. Because we find that the Respondent's bargaining conduct was lawful, we conclude, contrary to the judge, that the strikers remained economic strikers.

3. The judge found that the Respondent violated Section 8(a)(5) of the Act by failing and refusing to furnish the Union with financial information requested on several occasions in "late 1979 and early 1980" notwithstanding that the complaint alleged a violation in this regard only after 15 December.[37] We find merit in the Respondent's exceptions to this finding. We disagree with the judge's conclusion that this issue was fully litigated during the hearing. Despite the fact that some evidence was produced regarding information requests during the above time period, we are not satisfied that the Respondent had sufficient notice that any failure to furnish information pursuant to those requests was a litigable issue in this proceeding. We note particularly that during the hearing the General Counsel specifically disavowed any intent to litigate whether the Respondent failed to furnish financial information prior to 15 December. Accordingly, we reverse these findings of the judge.

The Respondent further excepted to the judge's finding that during the contract negotiations of 1980—1981, the Respondent failed to furnish the Union with financial data to substantiate its claim that its business conditions were deteriorating. We find merit in these exceptions. Although the complaint alleges a violation after 15 December, we note that throughout negotiations the Respondent complied with the Union's requests for financial data. In addition to the information discussed above with respect to negotiations, the record shows, for example, that on 5 September the Union requested information regarding the cost of Blue Cross/Blue Shield medical coverage and sick and accident weekly benefit

[37] The Union requested financial data in late 1979 following the Respondent's plea for economic relief and in early 1980 following the Respondent's announcement that it planned to discontinue its parts assembly operation.

coverage. The information was provided that day.[38] On these facts we conclude that the Respondent did not fail or refuse to provide the Union with financial information after 15 December or at any other time.

Amended Remedy: As noted above, we have affirmed the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by unlawfully failing to bargain in good faith with the Union regarding its decision to transfer and subcontract its parts assembly operation. Accordingly, we agree with that portion of the judge's recommended remedy ordering the Respondent to cease and desist from engaging in such conduct. However, contrary to the judge, we do not believe that, in the circumstances of this case, the Respondent should be ordered to bargain collectively with the Union on request regarding the decision to subcontract. As discussed below, we find that the Respondent lawfully sold the parts assembly equipment several months after the work was subcontracted and ceased its parts assembly operation. Accordingly, we shall not require the Respondent to engage in a meaningless gesture by ordering it to bargain about a decision that subsequent events, i.e., the sale, have overtaken. However, to ensure the Respondent's adherence to its bargaining obligations and to effectuate the policies of the Act, we shall order the Respondent, on request, to bargain collectively with the Union regarding any like decisions entailing mandatory subjects of bargaining. Further, although we agree with the judge's recommendation that the Respondent pay backpay to 24 employees who were laid off as a result of the Respondent's decision to subcontract its parts assembly operation, we shall limit the backpay remedy so as to be

[38] We note that the Respondent also furnished the Union with noneconomic information on request. For instance, on 19 January 1981 the Respondent complied with the Union's request for the names of strikers who allegedly engaged in picket line misconduct. On 26 February 1981 the Respondent provided the Union with information regarding the number of replacement employees hired since the commencement of the strike. Finally, on 9 October 1981 the Respondent furnished the Union with a list of its job classifications and the number of employees in each position pursuant to the Union's request of 20 October 1981.

applicable only for losses incurred from the date of the layoff until 1 July 1980, the date the Respondent sold the parts assembly equipment.

The facts establish, as set forth above, that following the layoff of 24 employees on 15 February 1980[39], the Respondent transferred its parts assembly equipment to Stamtec. At that time, the Respondent acknowledged that, although the work was contracted out to Stamtec, it retained the purchase orders for the parts assembly work so that quality control could be monitored and customers retained. However, on 1 July, Stamtec exercised an option contained in its agreement with the Respondent to purchase the equipment leased since February. There is no further evidence as to Eltec's business relationship with Stamtec following the purchase of this equipment and the General Counsel has not attempted to refute the Respondent's claim that as of 1 July 1980 it had made final its decision to terminate the assembly operation and get out of the assembly business.

We find that the sale of the Respondent's parts assembly equipment to Stamtec on 1 July resulted in an operational change that is properly characterized as a partial closing within the meaning of *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). The sale amounted to a substantial restructuring of the Respondent's ownership of and control over plant equipment and resulted in a "change in the scope and direction of the enterprise . . . akin to the decision whether to be in business at all."[40] The Respondent's business was fundamentally altered when, as a result of the sale of the parts assembly equipment, complete ownership and control

[39] In his recommended Order, the judge erroneously listed the names of the employees laid off on 15 February 1980 when referring to the reinstatement rights of strikers found by the judge to be unfair labor practice strikers. The revised Order corrects the error as it relates to the 24 laid-off employees. However, as we have concluded that the strikers remained economic strikers in light of our conclusion that the Respondent did not engage in bad-faith bargaining, the revised Order deletes all references to the reinstatement rights of the strikers.

[40] *First National Maintenance Corp.*, supra at 677.

were shifted to Stamtec. Following the sale, the Respondent no longer performed parts assembly work for its customers, and indeed did not even have the equipment to do such work. The capital transactions involved in the sale were substantial, as evidenced by the fact that the Respondent received about $132,000 for its parts assembly equipment. Under First National Maintenance, the Respondent's action represents a major entrepreneurial decision not amenable to resolution through the collective-bargaining process.[41] Consequently, we conclude that the Respondent's breach of its obligation to bargain with the Union concerning its decision regarding its parts assembly operations ceased as of 1 July. Accordingly, we shall order the Respondent to make whole the employees laid off as a result of the Respondent's decision to subcontract its parts assembly work by payment of backpay, including fringe benefits but less interim earnings, from 15 February 1980, the date of the layoff, through 30 June 1980, the last day during which the Respondent engaged in the parts assembly business. Backpay is to be computed in the manner set forth in F.W. Woolworth Co., 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in New Horizons for the Retarded.[42] We shall also order that the Respondent establish a preferential hiring list of all employees laid off on 15 February. Should the Respondent resume parts assembly operations in the Plymouth, Michigan area, we shall order it to offer reinstatement to these employees and to bargain with the Union on request regarding the terms and conditions of employment of individuals employed to perform such unit work.[43] Further, in view of the fact that the

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[41] *See also Summit Tooling Co.*, 195 NLRB 479, 480 (1972); *Kingwood Mining Co.*, 210 NLRB 844, 845 (1974).

[42] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB No. 181 (May 28, 1987), interest on and after 1 January 1987 shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. @ 6621. Interest on amounts accrued prior to 1 January 1987 (the effective date of the 1986 amendment to 26 U.S.C. @ 6621) shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

[43] *Summit Tooling Co.*, supra at 480—481.

Respondent no longer conducts parts assembly operations at its Plymouth location, we shall order the Respondent to mail to each employee laid off as a result of its decision to subcontract the parts assembly work, as well as post at its Plymouth, Michigan location, copies of the attached notice marked "Appendix."

ORDER

The National Labor Relations Board orders that the Respondent, Plymouth Stamping Division, Eltec Corporation, Plymouth, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively and in good faith with Local 985, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW (Union), as the exclusive representative of its employees in the appropriate unit set forth below, concerning decision entailing mandatory subjects of bargaining. The appropriate unit is:

All full-time and regular part-time production and maintenance employees employed by Respondent at is facility located at 315 West Ann Arbor Road, Plymouth, Michigan, including leaders, and shipping and receiving employees; but excluding office clerical employees, technical employees, professional employees, and guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively and in good faith with the Union as the exclusive bargaining representative of all employees in the appropriate unit described above with respect decisions entailing mandatory subjects of bargaining.

(b) Make whole the employees listed below who were laid off as a result of the subcontracting of the Respondent's parts assembly work by payment of backpay, at the rate of their normal wages, including fringe benefits, when last in the Respondent's employ, from 15 February 1980, the date of the layoff, through 30 June 1980, the last day during which the Respondent engaged in the parts assembly business. Backpay is to be computed in the manner set forth in the amended remedy section of this decision. The names of employees laid off on 15 February 1980 are as follows:

Wilson Holifield	Billy Wilson
Roy Bartlett	Fred Ratledge
Sherman Little	Donald Uhrich
Eugene Reed	Myron Severson
Rosalie Owens	Mitko Jancevski
Michael McColloch	Waltraud Tews
William Odom	Elzbieta Wilson
David Hudson	Carlton Falk
John Sharkany	David Buford
Henry Honeycutt	Bobby Main
Barry Isaacson	Ruben Davis
Kyle Evans	Lottie Davis

(c) Establish a preferential hiring list of all employees laid off as a result of the Respondent's decision to subcontract its parts assembly work and, if parts assembly operations are ever resumed in Plymouth, Michigan, or in the Plymouth, Michigan area, offer reinstatement to those employees to their former or substantially equivalent positions, and bargain with the Union, on request, without prejudice to the employees' seniority or other rights.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its facility in Plymouth, Michigan, copies of the attached notice marked "Appendix" and mail copies

thereof to all employees of the Respondent who were laid off as a result of the Respondent's decision to subcontract its parts assembly work.[44] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative. Thereafter, a copy shall be mailed by the Respondent to each of the laid-off employees listed above, and additional copies shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be take by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations not found in this decision.

CONCUR BY: DOTSON (In Part)

DISSENT BY: DOTSON (In Part)

DISSENT: CHAIRMAN DOTSON, concurring and dissenting.

I agree with my colleagues, for the reasons stated by them, that the Respondent did not violate Section 8(a)(5) of the Act by engaging in surface bargaining or by failing to provide the Union with financial information. I disagree, however, with their adopting of the judge's finding that the Respondent violated Section 8(a)(5) by failing to bargain in

[44] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER TO THE NATIONAL LABOR RELATIONS BOARD."

good faith with the Union regarding its decision to transfer and subcontract its parts assembly operation.

In *Otis Elevator Co.*, 269 NLRB 891 (1984), the Board determined that management decisions which affect the scope, direction, or nature of an enterprise are excluded from the limited mandatory bargaining obligation of Section 8(d) of the Act. As stated in Otis, the critical factor in determining whether a management decision is subject to mandatory bargaining is "the essence of the decision itself, i.e., whether it turns upon a change in the nature or direction of the business, or turns upon labor costs; not its effect on employees nor a union's ability to offer alternatives." Id. at 892. Applying that analysis to the facts of this case,[1] I find that the Respondent's decision to transfer and subcontract its parts assembly operations turned not upon labor costs but upon a significant change in the nature and direction of the business and therefore was not subject to mandatory bargaining.

Reviewing the reasons for the Respondent's actions, it is evident that the decision did not turn upon labor costs, although such costs were considered in the decision-making process. By subcontracting one of its two major operations, the Respondent was attempting to restore its enterprise to economic viability, a prospect threatened by rapidly diminishing sales in a depressed industry, abnormally high interest expenses, noncompetitive wages, and an unfavorable business environment resulting from high state taxes.[2] The facts establish that the decision at issue here clearly turned upon a fundamental change in the scope, nature, direction of the Respondent's enterprise, particularly in light of the contemplated sale of the parts assembly operation. Through this sale, the Respondent experienced a substantial capital re-

[1] The facts are fully set out in the Majority opinion.

[2] I note that there is no allegation or evidence that the Respondent's actions were motivated by union animus.

structuring and ceased to be engaged in the parts assembly business.[3]

I recognize that labor costs were among the considerations which resulted in the Respondent's decision to alter the scope of its business. I also recognize that after the Respondent informed the Union of its plans to transfer its parts assembly operations, the Respondent exhibited a willingness to discuss concessions with the Union. However, I find that the Respondent's general statement to the Union regarding its willingness to talk about the transfer are insufficient to establish that the decision turned upon labor costs. In reaching this conclusion, I note that the Respondent "retained no control over the equipment or the employees in the subcontractors' . . . system" and "no alter ego or other sham devices were employed to disguise a unilateral reduction in labor costs in an operation over which the employer maintained surreptious control." [4]Furthermore, the Respondent would have a continuing relationship with the Union which represented the remaining employees, amounting to more than half of the original work force. In response to the Union's demand that the Respondent bargain over the announced change, the Respondent attempted to accommodate its employees' collective-bargaining representative. As the Respondent advised the Union, it was prepared to discuss such matters as the reasons for the change, effects of the transfer, relocation of employees, any rights affected employees may have under the collective-bargaining agreement, and "other alternatives." Further, there is no evidence that the Respondent's alleged attempts to gain concessions prior to

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[3] My colleagues recognize that the transfer and subcontracting of the parts assembly operation was but one step in the eventual sale of that operation. Thus even though my colleagues find that the Respondent unlawfully failed to bargain in good faith over the subcontracting decision, they agree that in light of the sale the operation, the Respondent need not "engage in a meaningless gesture" by bargaining "about a decision that subsequent events, i.e., the sale, have overtaken."

[4] Otis, supra at 893.

the transfer were restricted to its parts assembly employees.[5] Thus, the Respondent's willingness to confer with the Union regarding that, from all appearances, would affect the entire unit does not establish that the decision to transfer and subcontract the parts assembly operation turned upon labor costs in that operation.[6] To decide otherwise might discourage employers from voluntarily conferring with their employees' collective-bargaining representative regarding permissive subjects of bargaining, particularly when an employer engages in such actions as part of an attempt to salvage a failing enterprise.

Accordingly, I conclude that the Respondent had no obligation to bargain with the Union regarding its decision to transfer and subcontract its parts assembly operation, a decision which turned upon a fundamental change in the scope, nature, and direction of the enterprise.

Dated, Washington, D.C. 19 November 1987

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[5] Regarding the parties' discussions of concessions of 14 February, I note that neither the exact contentions of the parties' exchanges nor the precise nature of the concessions is entirely clear. From all accounts, concessions appear to have been discussed only in vague, general terms.

[6] As mentioned above, the Board stated in Otis that the critical factor in determining whether a decision is a mandatory subject of bargaining is not "a union's ability to offer alternatives." In this regard, I note that it is questionable whether the Union, which did not exhibit a willingness to assist the Resident economically in the past, could have granted concessions large enough to compensate for losses resulting from the Respondent's rapidly diminishing sales. Board is in no position to determine in this case whether the granting of concessions offered a feasible alternative to the Respondent's decision. As the Supreme Court stated in *First National Maintenance*, 452 U.S. 666 at 682 (1981): "If labor costs an important factor in a failing operation . . ., management will have an incentive to confer voluntarily with the Union to seek concessions that may make continuing business profitable. "Nonetheless, the Court found in that case that the factor of labor costs was insufficient to bring the employer's decision to partially close its business within the application of Sec. 8 (d).

PLYMOUTH STAMPING DIVISION, ELTEC CORPORATION and LOCAL 985, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW)

Cases 7-CA-17416, 7-CA-19179

Decision of Administrative Law Judge ELBERT D. GADSDEN

Statement of the Case

ELBERT D. GADSDEN, Administrative Law Judge: Upon unfair labor practice charges filed on February 4, 1980 and April 10, 1980, respectively, by Local 985, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), hereinafter called the Union or Charging Party, against Plymouth Stamping Division, Eltec Corporation, herein called Respondent, an order consolidating cases, complaint and notice of hearing was issued by the Regional Director for Region 7, on behalf of the General Counsel, on May 29, 1981.

In substance the consolidated complaint alleges that on a certain date Respondent for the first time notified its assembly employees that it was terminating its parts assembly operation within 4 days, and that they would be laid off at the end of the second shift on that date; that said employees were in fact laid off accordingly; that on the next and fifth day, Respondent had its part assembly equipment moved from its Plymouth, Michigan plant to Stamptec Corporation located in Wauseon, Ohio, without affording the Union a meaningful opportunity to negotiate and bargain about the matter; that at various times during December 1980 through May 1981, Respondent engaged in surface bargaining without any intent to reach an agreement with the Union, and continually failed to furnish financial information requested by the Union to explain its need and request to the Union for monetary relief; that Respondent unilaterally repudiated an

existing negotiated obligation to maintain contributions to employees pension fund; and that since some employees went on strike, Respondent has prolonged the strike by the above-described unfair labor practices, in violation of Sections 8(a)(1) and 8(a)(5), respectively, of the Act.

On June 10, 1981, Respondent filed an answer in which it denied committing any of the unfair labor practices set forth in the consolidated complaint.

The hearing in the above matter was held before me in Detroit, Michigan on April 26, May 11, 12, 13 and 14, and on June 15 and 16, 1982. Briefs have been received from counsel for the General Counsel, counsel for the Charging Party, and counsel for the Respondent, respectively, which have been carefully considered.

Upon the entire record in this case and from my observation of the witnesses, I hereby make the following:

Findings of Fact

I. Jurisdiction

Plymouth Stamping Division, Eltec Corporation, the Respondent herein, is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of Michigan.

At all times material herein, Respondent has maintained its principle office and place of business at 315 West Ann Arbor Road, Plymouth, Michigan, where it has been and is now engaged in stamping, sale and distribution of automotive parts and related products. During the year ending December 31, 1980, which is a representative period, Respondent, in the course and conduct of its business operations, had gross revenues in excess of $500,000 and purchased and caused to be transported and delivered at its Plymouth plant, steel valued in excess of $50,000 which was transported and delivered to its Plymouth plant directly from points located outside the State of Michigan.

The complaint alleges, the Respondent admits, and I find that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The complaint alleges, the Respondent admits, and I find that Local 985, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), herein called the Union or Charging Party, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. Background Facts

At its plant in Plymouth, Michigan, Respondent is and has been engaged in the stamping, sale and distribution of automotive parts and related products. Approximately 25 of its employees were employed in a parts assembly operation. They also helped constitute a unit appropriate for purposes of collective bargaining as follows:

All full-time and regular part-time production and maintenance employees employed by Respondent at its facility located at 315 West Ann Arbor Road, Plymouth, Michigan including leaders and shipping and receiving employees; but excluding office clerical employees, technical employees, professional employees and guards and supervisors as defined in the Act.

Since about 1960 and thereafter, Local 985, the Union herein, has been designated the exclusive collective bargaining representative of Respondent's employees in the unit hereinabove described, and said Union has been recognized as such representative by the Respondent which has been embodied in successive collective bargaining agreements, the most recent of which was effective by its term for the period September 1, 1977 to September 1, 1980.

At all times material herein, the following named persons occupied the position set opposite their respective names,

and have been and are now supervisors of the Respondent, within the meaning of Section 2(11) of the Act, and are agents within the meaning of Section 2(13) of the Act: Richard Taylor General Manager and Vice-President Rex Smith, Sales Manager James McLean, Sales Engineer until February 15, 1980, Ed Austin Operations Manager, until February 15, 1980; when McLean terminated their employment with Respondent at the close of business.[1] At the trial paragraph 12(b) of the complaint was amended to insert after the word "place", insert a comma, and after the word "Ohio", add: "and subcontracted said assembly operations to Stamptec".

B. Informal and Formal Communications Between Respondent and the Union

In August of 1979, Respondent had approximately 75 bargaining unit employees of which about 25 were parts assembly employees. On or about August 28, 1979, Respondent's vice-president and general manager, Richard Taylor, met with the bargaining committee of the unit employees and presented them with "Company Economic Survival Proposals" (G.C. Exh. 8) requesting economic relief from the Union as follows:

Agreement is needed on the four following proposals:

I. Effective immediately a moratorium on all contractual wage increases (A.I.F. & C.O.L.A.) for a period of one year, until September 1, 1980 and except for skilled trades a $0.50 per hour wage reduction.

II. Effective October 1, 1979 a change in Blue Cross and Blue Shield coverage or convert to the Health Alliance Plan an H.M.O.

A. Blue Cross and Blue Shield major changes:

(1) MVF-III

[1] The facts set forth above are undisputed and are not in conflict in the record.

(a) Hospital coverage for four months instead of current twelve months (Master Medical would pick up coverage after four months).

(b) Hospitalization costs $50.00 deductible instead of current 100% coverage.

(c) Employee pays 20% (80/20 plan) of doctor fees instead of current 100% coverage.

(d) dependent children coverage (19 to 25 years old).

(2) Master Medical same as current.

(3) Prescription drug is $3.00 co-pay instead of $2.00 co-pay.

(4) Dental services that were covered 90% or 100% would change to 50%.

B. Health Alliance Plan has approximately same coverage as current except that employee must go to H.A.P. approved clinics and hospitals for treatment to be covered. The above proposal also included recommended changes in the contract as well as stated reasons for the entire proposal (G.C. Exh. 8).

Subsequently, during a grievance meeting on September 6, 1979, President Taylor asked Local 985 President and Servicing Representative, John Ellis to lend his assistance to the bargaining committee to grant Respondent such concessions as foregoing a wage increase and C.O.L.A. payment due the first payday in September 1979, changes in the Blue Cross/Blue Shield insurance plan and in some work rules. Ellis advised Taylor that the Union would have to see its books before it could consider the proposal and Taylor agreed that the UAW's auditors could contact Respondent's accountants to advise what financial information it needed.

On September 10, 1979, when the increases were due, Respondent posted a notice to employees on the bulletin board which read as follows:

Until the current discussions between the Company and the Union, regarding the four "Company Economic Survival Proposals" reach a conclusion, we must, regretfully, put the wage moratorium part of these proposals in effect. This move is necessitated for the reasons outlined in the "Company Economic Survival Proposals" of August 28, 1979.

No further implementation of these proposals is planned until the Company and the Union discussions are completed by the end of September. Your understanding and cooperation during these difficult times is appreciated.

Consequently, Respondent did not pay the scheduled wage and C.O.L.A. increases pursuant to the contract on September 10, 1979 and the Union filed a grievance on September 12, 1979 as a consequence thereof. The Union and the Company met on the grievance on October 10, 1979, during which time, legal counsel and chief negotiator for the Respondent, William L. Hooth and Union Representative John Ellis got into a dispute as to how the Company was to comply with the Union's request for financial information. Ellis charged the Company with having failed to furnish the information and the Company contended that it thought the Union auditors were going to contact the Company. Ellis said he sent the Company a letter and that letter was clear. Mr. Hooth said the letter was not clear.

However, it was particularly observed by the undersigned that the Union's letter (Respondent's Exh. 20) states in closing, "Please contact me if you have any questions". The letter was signed, John Ellis with an enclosure and copy to Milton Williams.

The record does not show, however, that the Respondent ever indicated to the Union between the letter of request and the grievance meeting on October 10, that it had a question concerning the information requested. Moreover, it is clear that Ellis' complaint during the grievance meeting on October 10, about the Union not having received the requested financial information, clearly evidenced an affirmation of the

Union's September 14 request for such information. Ellis also complained about the Company's failure to pay the scheduled wage and cost of living increase and the Respondent decided, and thereafter paid the increases in December 1979. The record does not show that the Respondent made any effort to contact the Union for the purpose of submitting the requested information. Since the Union did not receive the requested financial information at any time prior to February, it did not grant economic concessions as requested by the Company.

The undisputed evidence further established that upon the request of Company vice-president Richard (Dick) Taylor, the Union acting steward and recording secretary, Mildred McCullum and other bargaining committee members Mike Lipshu and Ellen Petty, met with Vice-President Taylor and Plant Superintendent Karl Klafee on February 11, 1980. At that time the committee was given a written notice (G.C. Exh. 2) which advised that the Respondent planned to terminate its parts assembly operation at the conclusion of the second shift on Friday, February 15, 1980; that the tool room and staffing operations would not be affected; that assembly operation employees would either be transferred or laid off in accordance with the Union agreement; and that this action was necessary as a result of the Company's business and economic situation as had been previously discussed with the Union. The nc ce added: "We are prepared to discuss this matter with you further". It was signed by General Manager Richard Taylor.

McCullum and her committee were "shocked" and management agreed to meet with them at a later time. After talking with vice-president of Local 985, Rollie Cary, who informed McCullum that he would be willing to meet with them, directed her to request management to have its attorney present. Management agreed with the request but advised that the attorney would not be available until Thursday, February 14, 1980 and the Union agreed with that date. Present at the February 14 meeting for the Union were:

1. Mildred McCullum
2. Ellen Petty
3. Mike Lipshu
4. Milton Williams, chief steward
5. Miriam Elston
6. Rollie Cary, vice-president of the Union.

John Ellis was on vacation for 8 days and was not to return until Monday, February 18th.

Present for the Respondent were:

1. Attorney James Perry
2. Karl Klaffee, superintendent
3. Richard Taylor, vice-president
4. Ed Austin.

President Taylor advised the committee that the layoff would be plant-wide, based on seniority. He explained the Company's economic problems by pointing out that there had been a 25 percent decline in sales; that the wage rates for parts assembly were no longer competitive; that taxes for doing business in Michigan was burdensome; and that workmen's compensation cost was high.

Cary testified that he asked Mr. Taylor who was going to retain the purchase order for the product line (work to be performed) and when was the decision made to terminate parts assembly, but Mr. Taylor only responded that the Company had to have an answer by the next working day, February 15, 1980. Cary said he then asked Mr. Taylor were the machines going to be sold but the latter did not answer. Cary said he told Attorney Perry that the Company was totally ignoring and flaunting the recognition clause of the contract; and that there were certain legal requirements for plant movement. The Company denied plant movement, but contended it was selling it. He advised the Company

that it still had to sit down with the Union and bargain to an impasse; that under law the Company had not done that . . . the Company cannot move the jobs without bargaining with the Union. The committee then discussed which employees would be affected by the move.

Miriam Elston testified that the committee asked the Respondent during the February 14th meeting what could be done to keep the assembly parts jobs in the shop. She said the company stated that the Union would have to give it substantial wage reductions, a freeze in C.O.L.A., a reduction in some benefits, and a relief in company work rules. Elston's testimony was essentially corroborated by committee member Mildred McCullum.

Since the Company insisted that it receive an answer from the Union on economic concessions by the next day (February 15), Cary said he told the Company that was impossible; that the Union and the Company had a meeting in August about union concessions, reductions, etc., but that the company had not opened their books and he understood that the company had not completed the proper form sent to it by the Union auditors. He then asked the Company was the decision to move the jobs irreversible and the Company said "no", but it had to have an answer by the next morning, for economic reasons. Cary said he then told Mr. Taylor that Ellis had talked to the Company about concessions in August 1979 and he requested Respondent to wait until Ellis returned from vacation on Monday or Tuesday, February 18 or 19, because the Union did not have enough time, plus it had a membership meeting at 3:00 on the same afternoon (February 14). Cary told the company he would get back with it but he personally did not get back to the company. Cary's testimony is essentially corroborated by bargaining committee members Mildred McCullum and Miriam Elston.

While Cary did not personally get back with the Company as he indicated, he stated that he did see the response (G.C. Exh. 5) sent to the Company on the same date and allegedly mailed on February 14, 1980, which read as follows:

Please be advised that the Union is requesting information relative to the Company's plans to permanently terminate all parts assembly operations at the Plymouth Stamping Plant as follows:

1. A detailed statement of all reasons the Company is contemplating the sale of parts assembly operations.

2. When did the Company make their decision.

3. When was the decision finalized.

4. Where is the work going and what Company is buying the operation.

5. The relationship between Plymouth Stamping and the Company who is buying the operation. (Attach a copy of an agreement or letter of understanding that Plymouth Stamping has entered into with the respective purchaser).

6. How many jobs will be available at the new site.

7. The rate of pay and benefits available at the new site.

In addition, the Union is requesting a complete audit of the Plymouth Stamping books to prove your claim that the Company's business is experiencing "tenuous financial difficulties".

Awaiting your written reply, I remain

Sincerely,

Miriam Elston, International Rep. REGION, 1A, UAW Miriam Elston testified that her letter dated February 14 (G.C. Exh. 5) was sent to Respondent certified mail on February 14, 1980.

The record shows that the above letter from the Union (G.C. Exh. 8) is Company-stamped dated February 20, 1980,

the date on which Respondent's President Taylor testified the company actually received it.

Miriam Elston further testified that after talking with the Union's General Counsel she thereafter filed charges with the National Labor Relations Board on February 14, 1980. On February 15, 1980, the Respondent either posted or delivered a copy of the following notice to the employees named therein:

> The following employees are placed on indefinite lay-off effective at the end of their regular shift, Friday, February 15, 1980: Wilson Holifield, Billy Wilson Roy Bartlett, Fred Ratledge, Sherman Little, Donald Uhrich, Eugene Reed, Myron Severson, Rosalie Owens, Mitko Jancevski, Michael McColloch, Waltraud Tews, William Odom, Elzbieta Wilson, David Hudson, Carlton Falk, John Sharkany, David Buford, Henry Honeycutt, Bobby Main, Barry Isaacson, Ruben Davis, Kyle Evans, Lottie Davis. This lay-off is due to the termination of assembly operations at Plymouth Stamping, effective at the end of the afternoon shift on Friday, February 15, 1980.

Vice-President and General Manager Richard Taylor testified that the arrangements to actually move the machinery from Plymouth to Stamptec in Wauseon, Ohio were made during the late afternoon of Friday, February 15 and the machinery was actually moved on Saturday, February 16. However, he changed his answer to say the arrangements to move the equipment were made on February 8 or February 11, 1980. He acknowledged that the first time he or the Respondent advised the Union of its plan to move the parts assembly operation was during the meeting held on Monday, February 11, 1980. He further testified that if the Union had said it was willing to negotiate concessions, it would not have been necessary to move the operation on February 15, and a move would not have occurred. He said what made a decision from the union on its request urgent, was the deteriorating business situation and the logistics of moving the operation so as not to break continuity of operation. Although the

equipment was shipped to Ohio on February 16 and 17, Respondent did not commence shipping parts until March 1, 1980. Vice-president Taylor admitted that it sold its equipment to Stamptec in July of 1980 pursuant to a lease arrangement made in March 1980. There was no further discussions between the Respondent and the Union regarding the termination and move of the parts operation after the grievance meeting on February 29, 1980 until the parties commenced to bargain for a new contract in August 1980.

On cross-examination Mr. Hooth testified that he became involved in the Respondent's negotiations on August 28, 1979 and specifically in the meeting of September 6, 1979. He acknowledged that in the August and September 6 meetings, the Union advised Respondent it would have to see its books before it could consider or make any economic concessions. He further acknowledged that said request was also made by the Union in writing. The Company was willing to make the data available but the Union did not look at it.

When shown a letter addressed to the Respondent dated September 14, 1979, (Respondent's Exh. 20), in which the Union's auditors requested Respondent to provide it with financial data specified on an enclosed sheet, further requesting the Respondent to contact it if the Respondent had any questions, Mr. Hooth acknowledged the letter and stated that Respondent did not provide the information requested because it did not deem the letter to be a request to send the Union the subject data, in view of what the arrangements were. It is particularly noted that the Respondent did not contact the Union to inquire about arrangements nor did it invite the auditor to come to its offices for such data.

Mr. Hooth admitted that the company did not comply with the contract by not implementing the wage increase due September 1, and included on the check due September 9 or 10 or 11. When the increase did not appear on the check on September 9, 10 or 11, the Union filed a grievance on September 12. The Company still did not implement the increase and Ellis called Mr. Hooth on October 10. Mr. Hooth

admitted that he knew on February 14 that Mr. Ellis was on vacation and that the union had requested the Respondent to wait until Mr. Ellis returned, before moving the equipment, but he and the company did not see any reason to do that.

Mr. Hooth acknowledged that when Mr. Taylor informed him that the company had not heard from the union on February 15, he advised the company to go forward with its plans to move the parts assembly operation, although he knew that the union had requested the company to wait until its chief negotiator Ellis returned from vacation on Monday or Tuesday, February 18 or 19, 1980. When Hooth reached Ellis on February 20, he testified he made it clear to Ellis that the move to Ohio decision was not final; that their company was still willing to talk and could move the equipment back from Ohio. He does not recall whether Ellis asked him to bring the equipment back from Ohio, but he may have. He further acknowledged that there was no commitments or reasons why the equipment was actually moved on February 16.

On cross examination Mr. Hooth acknowledged that Respondent may have placed an ad for "help wanted" in the "Fulton County Exposition", a Wauseon, Ohio newspaper on February 12, 1980. He also acknowledged that on February 29, union President Ellis said the only way the problem could be rectified was to return the work from Ohio to Plymouth Stamping. Ellis was the union's chief negotiator with the company (Mr. Taylor) for the past 12 years, except when he was ill. He did not appear and testify in this proceeding because he died suddenly on Sunday, April 25, 1982, the night before the trial in this proceeding commenced.

The record shows, that on Saturday and Sunday, February 16 and 17, 1980, respectively, Respondent dismounted, and using five semi-trucks, removed and transported all of its parts assembly machinery and equipment from its Plymouth plant, 90 miles away to Stamptec, a company in Wauseon, Ohio, at an approximate cost of $14,000. Vice-president Taylor became a 38 percent shareholder in Stamp-

tec in January 1980, at which time he commenced to negotiate a building lease for Stamptec, and arranged the lease of Respondent's machinery valued in excess of $132,000.

In response to the Union's letter of February 14, 1980 requesting information regarding the Respondent's move of the parts assembly operations, counsel for the Respondent's letter dated March 11, 1980 (G.C. Exh. 6) reiterated the same reasons for its moving the parts assembly operations that Respondent gave to the bargaining committee on March 14, 1980. In a further explanation of the move, the letter (G.C. Exh. 6) continued in pertinent part as follows:

The Company did not complete its plans to move the assembly equipment until Friday, February 15. This action was prompted by the fact that outside commitments had to be finalized at that time, and also by the fact that the Company had not received any affirmative response from the Union pursuant to the meetings on Monday, February 11 and Thursday, February 14.

Even though the Company has proceeded with its plans to terminate the assembly operations and effectuate the layoff of employees as announced, the Company's decision is not "finalized" in the sense that it is irreversible nor in the sense that the Company is unprepared to consider other alternatives. In this regard, the Company has been fully prepared to discuss this matter with the Union, and remains available to do so. 286 NLRB No. 85; 127 L.R.R.M.

The purchase agreement between Plymouth Stamping and Stamptec has not been completed in all respects.

Stamptec Corporation projects a work force of approximately 25 employees (excluding office employees). At present, approximately 8-10 employees have been hired.

Wage rates and benefits have not been finalized. Presently, the starting hourly rate for production employees is $3.50 and $5.50 for a maintenance employee.

With respect to your request for a "complete audit of the Plymouth Stamping books, "I am not sure precisely what information you are seeking. However, we are certainly prepared to provide relevant financial data assuming, of course, that the Union is requesting this information for the purpose of continued negotiations. If you will contact me directly I shall make the necessary arrangements.

Findings and Conclusions

Based upon the foregoing essentially undisputed and credited evidence, I conclude and find as follows:

1. That during the effective life of the current collective bargaining agreement on August 28, 1979, Respondent made a request to the Union in its "Company's Economic Survival Proposal" (G.C. Exh. 8) for economic relief.

2. During the same occasion on August 28, the Union advised the Respondent that it would have to see its books before it could consider its request.

3. During a grievance meeting on September 6, the Company asked the Union's chief negotiator Ellis to assist the bargaining unit in considering to grant the Company economic concessions, which included foregoing a wage increase and C.O.L.A. payment due on or about September 10, changes in Blue Cross and changes in company work rules. Union Representative Ellis stated that the Union would have to look at the books of the company before it could respond, and the Respondent agreed.

4. In a letter to the Respondent dated September 14, 1979, the Union outlined the specific financial information it requested for consideration.

5. When the Company met with the bargaining committee of the Union on October 10, 1979, it still had not furnished the information previously requested on

August 28, September 6, and more particularly in the Union's letter of September 14. Nor did the Respondent at any time before February 11, 1980, furnish the Union with the requested financial information. Additionally, nor had Respondent contacted or made any inquiry of the Union or its auditors about the requested financial data.

6. When the Union did not respond to its request to grant the economic concessions to the Respondent, the Respondent announced that it would not pay scheduled wage increases due the first payday in September 1979, which it did not pay as the contract provided, until after union president Ellis protested the action.

7. Since the Respondent did not receive the economic concessions it requested from the Union during its meeting with union representatives on October 10, it proceeded to arrange to subcontract its parts assembly work to Stamptec Corporation of Wauseon, Ohio, in which Vice-President Richard Taylor became a 38 percent stockholder in January 1980. Thereafter, on February 8, 1980, the company arranged to move its parts assembly equipment and operation to Stamptec in Wauseon, Ohio.

8. On February 11, 1980, without having afforded the union a meaningful and adequate opportunity to bargain on the matter, Respondent, for the first time announced to the Union's bargaining committee, in the absence of its chief negotiator Ellis, that it was terminating its parts assembly operation effective the end of the second shift on Friday, February 15, 1980; that employees in the parts assembly operation would be laid off in accordance with the contract; and that the Company was taking this action as a result of its economic situation previously discussed with the Union.

9. The Union committee was shocked by the action contemplated by the company and requested a meeting

with the company and the company's attorney, which the company advised could not be scheduled until Thursday, February 14. When the parties met on February 14, the Union requested Respondent to delay its decision to terminate the parts assembly operation until its chief negotiator, John Ellis, returned from vacation on Monday, February 18, 1980. Respondent said it had to have an answer on the requested economic relief by the end of the second shift on Friday, February 15. Although the Union advised that it would get back to the Respondent it did not do so before the end of the workday on February 15.

10. I credit the corroborated testimony of bargaining committee member Elston to the effect that during the February 14 meeting, the committee asked Respondent what would have to be done to keep the parts assembly operation at Plymouth. The Company replied, grant the economic relief it requested by the next day, February 15. Still not having received the financial data it requested, the Union advised the company that such a decision was impossible by the next.

11. In a letter dated February 14, 1980 (G.C. Exh. 5), which the union said it mailed on the same date (February 14) but Respondent said it did not receive until February 20, the Union made several inquiries about the assembly move and renewed its request for a complete audit of Respondent's books with the object of verifying Respondent's contentions about its economic difficulties.

12. Not having received a response to its request for economic concessions from the union at the close of business on Friday, February 15, Respondent, without notifying and affording the Charging Party a meaning and adequate opportunity to negotiate and bargain as the exclusive representative of its unit employees, transported its parts assembly equipment (valued at $132,000) and the entire operation on February 16 and 17, 1980,

90 miles away to Wauseon, Ohio, at an approximate cost of $15,000.

13. The Respondent acknowledged that it did not furnish the Union with the financial information requested by the Union. In fact, the Respondent stated that it did not deem it necessary to furnish the union with the requested financial information.

It is therefore clear from the foregoing undisputed findings that Respondent made its plans to subcontract its parts assembly work probably as early as late December 1979 or early January 1980, since President Taylor became a 38 percent stockholder in January 1980. It is highly unlikely that Mr. Taylor's stock ownership occurred overnight. Similarly, although Vice-President Taylor said Respondent made its decision to transfer and sublet its assembly operation in February 1980, it may be reasonably inferred from such facts that such arrangements for such a massive and expensive undertaking occurred at an even earlier date. This is particularly true when it is observed that President Taylor first testified that Respondent made its decision to transfer the parts assembly on the day it notified the union (February 11, 1980) about its plan and abruptly changed his testimony of the date to February 8, after he realized how questionable his answer was in view of the proximity of the date of actual transfer. In any event, Respondent's announcement was a fait accompli, as the General Counsel contends, in view of Respondent's December and January arrangements to transfer the operation and its decision to do so on or before February 8, 1980. Thus, it is abundantly clear from such evidence that Respondent did not earnestly intend to bargain with the Union on its assembly transfer decision, which from all appearances was a permanent and irrevocable decision. A.B.C. Trans-National Transport, Inc., 247 NLRB 246 (1980) and American Needle and Novelty Company, 206 NLRB 534.

Although Respondent told the Union after February 16, 1980, it was still available and willing to talk about its

implemented decision transferring the parts assembly operation, Mr. Hooth did not deny on cross-examination that the Union (Ellis, deceased union president) asked the Respondent during its February 28 or 29 meetings to return the parts assembly operation to Plymouth. It is clear from the record that Respondent did not return the assembly operation and its general statement about its availability and willingness to talk about the transfer, was neither a specific offer to bargain about the decision or the employees affected thereby. A.B.C. Trans-National Transport, supra.

In view of these well supported findings, I further conclude and find that by failing to give the union adequate notice and a meaningful and adequate opportunity to negotiate and bargain on its unilateral decision to transfer and subcontract its parts assembly operation to Stamptec Corporation, and by 5 days thereafter, actually transferring and subcontracting said parts assembly operation to Stamptec, the Respondent failed and refused to bargain with the Union, as the exclusive representative of its unit employees, in violation of Section 8(a)(5) and (1) of the Act.

Counsel for Respondent argues in his brief that neither Respondent's unilateral transfer decision nor its actual transfer and subcontracting of its parts assembly operation during the life of the contract was a mandatory subject of bargaining. However, from my reading of the Fiberboard Paper Corp. v. N.L.R.B., 379 U.S. 203, and the Board's decision in American Needle and Novelty Company, 206 NLRB 534, the Court as well as the Board have reached a conclusion opposite that advocated by Respondent. As the Board said in American Needle, supra:

The fact that here the Respondent transferred the work from one location to another, rather than subcontracting the work as in Fiberboard, does not change the result. It is well settled that an employer has an obligation to bargain concerning a decision to relocate unit work. . . . Thus, in Weltronic, supra, a case very similar on its face to the instant case, the Board found the employer acted unlawfully when

without bargaining he moved unit work from one plant to another with the ultimate result that 14 employees were laid off.

Hence, in the case herein, Respondent transferred the work and its equipment to another location (Wauseon, Ohio) and subcontracted the same work performed on the same equipment, in accordance with the same procedure, by different employees, resulting in the layoff of 24 employees. Consequently, I find that Respondent's decision to transfer, and its actual transfer and subcontracting of its parts assembly operation was a statutory and mandatory subject of bargaining. American Needle and Novelty Company, supra. The fact that Respondent gave the Union almost 5 days advance notice of its decision to terminate and transfer its parts assembly operation was clearly inadequate notice and time for the Union to engage in meaningful bargaining with the Respondent. The Board has found an 8(a)(5) violation where the employer gave the Union 8 days advance notice of its decision to transfer unit work. Royle Typewriter Company, 209 NLRB 1006 (1974).

In support of its contention that Respondent offered its assembly unit employees an opportunity to bargain on its decision to transfer the operation, counsel for the Respondent cites U.S. Contractors, Inc., and The Dow Chemical Company, 257 NLRB No. 152. However, there, unlike here, the Company had not announced to the union that it had irrevocably decided to end its custodial operation, but simply recited a series of factors which indicated that result, and requested discussion on the subject with the Union. The Union abruptly ended the meeting with the statement "there was nothing left to discuss". Here, on the contrary, Respondent unqualifiedly and irrevocably announced to the bargaining committee of its unit employees on February 11, that it was terminating its parts assembly operation and laying off its assembly employees at the close of the second shift on February 15. Although the Respondent had already made and announced the decision, the bargaining representatives

requested a meeting with the Respondent to discuss the decision. It was only after the Respondent had implemented its decision on February 16 and 17, when union president Ellis expressed hopelessness by stating "it is after the fact now." Nevertheless, at that time Ellis still requested Respondent to return the assembly operation to Plymouth.

Although it is not alleged in the complaint that Respondent failed and refused to furnish financial information requested by the Union on several occasions in late 1979 and early 1980, to enable the Union to intelligently consider Respondent's request for economic relief, the issue was nevertheless fully litigated herein. Not only was the issue litigated but the evidence is abundantly clear that the requested information was relevant and essential for the Union to intelligently determine if and how much relief was needed by Respondent, and if and how much the employees were able or willing to grant. Moreover, the union was the exclusive bargaining representative of the appropriate unit employees while the bargaining agreement was still effective. Consequently, Respondent was legally obligated to furnish the requested data and its failure and refusal to do so, prevented the union from effectively discharging its representative duties to its members, in violation of Section 8(a)(5) of the Act.

C. Respondent Engaged in Surface Bargaining

A. The Respondent and the Union entered into a collective bargaining agreement (G.C. Exh. 7) effective September 1, 1977 through August 31, 1980. The parties commenced negotiations for a new agreement on August 28, 1980.

B. At the August 28, 1980 negotiation session the parties discussed Respondent's proposal which had been submitted to the Union a few days before. The Union presented a counterproposal on temporary transfers and agreed to hold all wages for 1 year. The Company presented a counterproposal on transfers and a $3.00 reduction in benefits.

C. The next negotiation session was held on September 2, 1980, and the Union rejected the shared cost of $800 for

arbitration and indicated that it would go on strike before accepting it.

D. The auditors report from the Union" (Respondent's Exh. 24) was discussed at the September 3 meeting, when the Company proposed a $2 reduction in wages and $1 reduction in benefits for all employees. The Company also presented a new proposal on transfers. The parties met with the Federal mediator, Maurice Chagnon. The Union indicated a willingness to move on Blue Cross/Blue Shield. The strike was still in progress and the plant was operating with supervisory personnel and family members.

E. During the negotiating session on September 4, all non-economic issues were resolved and a strike thus far was adverted.

F. However, in the session on September 5, the parties were in a deadlock and the Union wanted to go on strike Monday, September 8th. The Company agreed to continue operations through September 8th and stood on its $2 reduction for production and $1 for all employees.

1. During the September 8 negotiating session, the parties discussed Respondent's proposal of September 5 (G.C. Exh. 12) during which Mr. Taylor explained the Company's financial situation, and told the Union "that is it" (take it or leave it). The membership met and discussed the Company's proposal (G.C. Exh. 12) and voted to reject it and decided to go on strike the next day, September 9. Mr. Hooth, counsel and chief negotiator for the Respondent, testified he presented the "Memorandum of Agreement" (G.C. Exh. 16) on the non-economic issues and the parties agreed.

2. At the September 11 negotiating meeting, the Company rejected the Union's proposal of September 5. The parties talked about the Company's September 5 proposal (G.C. Exh. 12). The Union agreed to the Company's demands on "A", "B", "D" and 5-random days. The parties agreed to obtain additional information on the difference in coverage

between the BVF-1 and the BVF-2 of Blue Cross/Blue Shield insurance plan.

3. On October 4th, Respondent instituted legal proceedings for injunctive relief against Union conduct. The union assured the Court that it would take steps to control exuberance on the picket line and the Respondent agreed to forebear its quest for an injunction.

4. On October 21st, the parties met with Federal mediator Chagnon. The union made an off-the-record proposal of a reduction of $1 across the Board, C.O.L.A. freeze with a reopener in 3 years. The parties did not agree. The Company commenced hiring replacements.

5. On October 27, Mediator Chagnon was present. According to the testimony of Mr. Hooth, the Company stuck to its $3 reduction demand to get its rates competitive in the parts assembly operation. When union representative Ellis asked the company was it prepared to settle on its September 5 proposal, Mr. Hooth said that was the Respondent's proposal but the Union had rejected it. Ellis accused the company of not bargaining in good faith. The Union made a proposal on holidays and the Company said it would get back to the Union on the subject.

6. At the November 5 meeting, the Company presented a new proposal (G.C. Exh. 13) which was different from its September 5 proposal (G.C. Exh. 12) as follows:

> 1. Increased its wage reduction demand by 50 cents, from $2 to $2.50 for production groups.
>
> 2. Increased its wage reduction demand by 50 cents for maintenance and skilled trades, all because of the Company's financial statement had reflected a $150,000 loss. The Company said it was still losing money and the strike was not helping the situation. The Union asked to see the financial statement that day and the Company said it was not available but that the Union could pick up the next day. The Union did subsequently

receive the financial statement. The Union nevertheless agreed to the Company's proposal of October 27 on holidays and on pensions.

7. On November 12, the Union made a counterproposal to the Company's November 5 proposal (G.C. Exh. 13) for a $1 wage reduction across the Board for all employees, instead of a $2 reduction for production employees and a $1 reduction for maintenance and skilled trades, as proposed by the Company. The Company's item 2, November 5 proposal for no increase in C.O.L.A. was agreed upon by the Union. The Union agreed to the Company's item 3, November 5 proposal on Blue Cross/Blue Shield. The Union met the Company on its 3B-Sick and accident, and its 3C-life and accident proposals. The Union agreed to discontinue optical insurance. The Union had previously agreed to the Company's holidays, and the random days and pension proposal. The Union rejected the Company's proposal on item 7-Vacation and entitlements since the Company rejected the Union's proposal for a $2000 arbitration expense fund, unless the Respondent returned the parts assembly work from Ohio. The Union agreed to a 2-year agreement and said if it were acceptable to the Company, the strikers could return to work the next day. The Company said that was not acceptable.

8. On November 25, the parties met with the mediator and the union had a new proposal with $1.25 reduction. The Company (Mr. Hooth) told the Union he did not know if the Company's proposal of September 5 was still outstanding because business was considerably worse, but he would talk to the Company about it.

9. During the December 4 session, the Union agreed to the Respondent's demand of a $2 cut in production wages but was advised by Mr. Hooth that the Union's November 5 proposal was rejected because the Company was opposed to an across the Board reduction; and that their $1.25 was a long way from $3. Ellis wanted a 3-year contract, freeze all fringe benefits, a 50 cents reduction across-the-board in wages for all employees, no C.O.L.A., an economic reopener after

1 year and fringes, with the Company's willingness to open its books to the Union. The Union also proposed a $2000 arbitration reimbursement fund and the return of the parts assembly operation from Ohio. Mr. Hooth further advised the bargaining committee that the Company was beginning to hire replacements and that the Respondent was now in the area of $6.50 for the production group to make the rate more competitive. He explained that the Company wanted an agreement for 1 year. The company was now paying workers $6.50 to start. The Company was now at a $6.50 per hour proposal and reconsidering its position on the Christmas holiday item and the Company did not want to terminate its replacement employees. The Union said it could not agree to the Company keeping the replacements.

10. During the December 11 session the Union presented a counterproposal to the Company's November 5 proposal for $2 reduction for production workers by agreeing to the $2 reduction, and also agreed to $1 reduction for maintenance and skilled trades. The Union also agreed to the change for trades and skilled trades, sick and accident insurance, and on the arbitration issue the Union moved from $800 to agreeing that it would pay its own arbitration expenses. The Union agreed to reduce the 2 year reopener to 1 year reopener, for amnesty for all strikers and the termination of all replacements. The Respondent rejected this proposal. Mr. Hooth told the Union the Company was reexamining its proposal and would be asking for more.

11. In the January 15, 1981, session, the Company proposed increasing its wage reduction for production employees from $2 to $3 with no change in other group wage reductions. The union was shocked. The Company further proposed that the Blue Cross/Blue Shield be changed from MBF-1 plan to MBF-2, no dental, no drug and delete the master medical out of the November 5 proposal. It also changed its position on sick and accident and a $5,000 reduction in life insurance. The Union met the Company's demand on these changes. The Company agreed to the

Union's Christmas bonus for $275 increase but it changed on its Christmas shutdown item. The Company agreed to keep its pension contribution proposal, but only for current employees as of September 9, 1980, and not for new hirees. The Company included a demand, number 10, to retain replacements. It also included a demand, number 11, amnesty for all strikers except those who had engaged in picket line misconduct whom the proposal did not identify or describe what constituted misconduct. The Company also proposed a demand, number 12, on supervisors performing work in the grievance procedure, all because the Company was losing money. The Company did not present any proof (financial data) of further losses. The Union rejected the Company's November 15 proposal. This session was called by the mediator and Mr. Hooth responded to the discussion regarding the Company's not granting amnesty to employees who were involved in the picket line misconduct. In a letter dated January 19, 1981 (Respondent's Exh. 26), in which he identified ten employees who were involved in what the Company described as picket line misconduct sufficient to warrant termination or other appropriate disciplinary action. The letter does not describe the nature of the misconduct. Mr. Hooth further stated that an agreement regarding the status of these employees would have to be included as part of the final settlement. . . .

12. In the next session on March 4, 1981, Mr. Hooth advised that the Company's position was the same as stated and modified in the December 15 meeting. He testified that he overheard a Mr. Bill Battle, Regional Director, respond "that the Union would just have to run the replacements out". This statement was not corroborated or further explained and the undersigned does not attribute to it any probative significance or relevance in resolving the issues herein.

13. In the March 10, 1981 session, the Union agreed to the Respondent's December 15 wage proposal and accepted the Blue Cross/Blue Shield proposal. Mr. Hooth said he did

not respond to the Union's acceptance at that time because he wanted to discuss the replacement issue with the Company.

14. In March 12, 1981 meeting Mr. Hooth presented a company proposal (G.C. Exh. 15) in which the Company granted New Year's Eve, as the employees had requested. The Company would retain replacements but would rehire strikers from a preferential hiring list. There were seven openings at this time. The company agreed to grant amnesty and Mr. Hooth added, provided the pending National Labor Relations Board charges be settled. Union President Ellis got upset and stated that the only proposal that was acceptable was the mediator's proposal of February 26, but he would take the Company's March 12 (Respondent's Exh. 28) proposal to the membership although he was sure it would be rejected.

With Respect to the Negotiations

Mr. Hooth acknowledged that the union requested financial data from it for the August negotiations and that it furnished said information on August 18, 1980. He said the company agreed to furnish the information to the UAW auditors because the company's financial situation was so critical at that time.

Mr. Hooth acknowledged that in the December 11, 1980 meeting, the Union met the wage reduction of the Respondent's proposal of November 5, but he rejected it, telling them that on December 4, the company was no longer at that position. At that juncture, he contends the union had not met the Respondent's November 5 proposal and the issues of replacement and amnesty were outstanding. The company changed its position on wages on one other occasion after the meeting on January 15, 1981, in the meeting on March 4, 1981.

Mr. Hooth further testified that after he received the union auditor's report in August 1980, he pointed out to the committee that the report was inaccurate; that instead of Respondent's losses being $135,000 they were in fact 1 half

million dollars; that the 19% lost in sales referred only to die sales, which were not stamping business. The loss in stamping sales was 25 or 26 percent (Respondent's Exh. 24). Mr. Hooth further testified that the company notified the replacements that they were permanent employees around the end of December, 1980.

Millie McCullum testified that on the afternoon before or after 2 negotiating meeting with management she heard Delores Cunningham ask Mr. Hooth "what are you doing to us?, everytime we come near an agreement, . . . then you go meet with Dick and then you come back and take it away". Mr. Hooth replied, he had instructions not to give but to take away. Delores asked him, instructions from whom?, and Hooth said "Taylor". She further testified that between February 16 and April 1980, she heard Eilis ask the company (Mr. Taylor) on at least two occasions to return the assembly work from Wauseon, Ohio. The undersigned was persuaded by the demeanor of McCullum, as well as by other credited testimony and the record and circumstantial evidence that her testimony was truthful and is credited.

A careful review of the respective positions of the parties expressed in their written and oral proposals and counterproposals during their informal discussions and bargaining sessions between August 28, 1980 and December 4, 1980, reveals that the parties were, in my judgment, engaged in hard bargaining, which became harder after the employees went on strike on September 9, 1980. The record nevertheless shows that on September 11, the Union agreed to several significant items of the Company's September 5 proposal (G.C. Exh. 12, items A, B, D and 5-random days). However, the Company presented a new proposal (G.C. Exh. 13) on November 5, 1980.

Without the Company revoking and without the Union verbally rejecting the Company's September 5, $2 wage reduction proposal (G.C. Exh. 12) on November 12, the Union made a counterproposal of $1 wage reduction for all employees and agreed to item 2 (C.O.L.A.) and item 3 (Blue

Cross/Blue Shield) of the Company's November 5 proposal. The Union also agreed to item 3 (Blue Cross/Blue Shield) and item 3B (Sickness and accident insurance) of the Company's November 5 proposal (G.C. Exh. 13).

On November 25, the Union made another wage-benefit reduction proposal of $1.25 for all workers, and the Company's representative said he would talk it over with the Company.

On December 4, the Union agreed to the Company's November 5 wage-benefit reduction proposal of $2 for production employees, but the Company advised the Union that its November 5 proposal was rejected because the Company was opposed to an across-the-board reduction; and that the Company was now at a $6.50 per hour proposal.

On December 15, the Company demanded an additional $1 wage benefit reduction, and the record shows that the bargaining posture of the parties was and continued as essentially enumerated by the General Counsel in his brief to the undersigned as follows:

> 2. Union agreed to a $1 cut from maintenance and no cut from tool room wages on December 11, and then the Employer demanded larger cuts orally on March 4 and in writing on March 12; 3. Parties had agreed to settle S & A benefits at $120/week on September 11, but the Employer suddenly demanded termination of such benefits in its December 15 proposal; 4. Union acceded to MVF 1 plan on November 12, then the Employer MVF 3 plan on March 4, and when Union finally agreed to choose between MVF 3 or equivalent on May 12, the Employer withdrew offer of MVF 3 on May, 14; 5. The Union agreed with the Employer on September 11 to keep life insurance at the present level ($13 G), then the Employer demanded a reduction of benefits to $8 G on December 15; 6. On November 5, the Employer agreed to increase Christmas bonus by $275.00 in exchange for reduction of paid holidays from 15 to 6, then on Decem-

ber 15 it demanded an end to the bonus (but added 2 more paid holidays, and later one more); 7. The parties agreed on November 12 to maintain the present pension contribution at $.34/hour, then on December 15, the Employer proposed to remove post-strike hirees from coverage and on May 14, announced a suspension of all contributions for 1 year; 8. The parties agreed to a 2 year contract on November 12, and then the Employer moved for a 1 year contract on December 15. The only compensatory proposal made by the Employer on December 15, when 6 of the 8 "take-aways" occurred was to add 2 paid holidays. Two of the other "take-aways" were introduced on March 12; the Employer's concessions were to grant striker amnesty and to add 1 paid holiday. It should be noted that the Employer has accused the strikers of nothing very serious in the way of misconduct and the strike, up until the mass picketing of May 8, was fairly peaceful. Granting "amnesty" on May 12, was not much of a meaningful concession, therefore. The most recent "take-aways" occurred on May 14, and no compensatory offers were made. It is not clear what practical impact the Employer's announcement regarding suspended pensions contributions has while striker continues. Arguably, the Union already agreed to oust post-strike hirees (i.e. replacements) from pension plan. See Unions proposal of February 26, 1981.

Conclusions

As previously indicated, it is observed that the parties reached agreement fairly early in their bargaining sessions on transfers, holidays, arbitration fund and vacations. By November 12, the Union had made concessions to relinquish drug and dental coverage, C.O.L.A., the optical plan, random days and the Christmas bonus. On December 4 and 11, the Union finally moved from its previously $1 and $1.25 reduction position for all employees, and agreed to a $2 wage-benefit reduction for production employees. The Company, on the other hand, moved from its original August $3 wage-

benefit to $2 on November 5, but after the Union agreed to its $2 proposal on December 4 and 11, Respondent increased its demand to the original demand of $3, and at a later date, further increased its reduction demand, allegedly to get its production rates competitive. The Company's position oscillated on the effective term of the contract or wage reopener from 2 to 1 year, or on when the 1 year was to commence, again allegedly because business was getting worse. Respondent did not provide updated financial data to substantiate its repetitive contention, in this regard.

By January 15, the Company changed the already agreed upon Blue Cross/Blue Shield, master medical, and modified its pension contribution proposal. It demanded to retain replacements, agreed to amnesty for strikers, except those involved in picket line misconduct, and included a demand on supervisors performing work in grievance proceedings. The Respondent did not present any financial data or any reasons to justify its changed and new bargaining positions.

Sections 8(d) and 8(a)(5) of the Act require management and the bargaining representative of its employees "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ". The Courts have held that this duty requires the parties to "approach the bargaining table with an open mind and purpose to reach an agreement consistent with the respective rights of the parties". *L.L. Majure Transport Company v. N.L.R.B.*, 198 F.2d 735 (C.A. 5, 1952). More specifically, as the Court said in *N.L.R.B. v. Herman Sausage Company*, 275 F.2d 229, 232 (C.A. 5, 1960):

> (O)ne must recognize as well that bad faith is prohibited though done with sophistication and finesse. Consequently, to sit at a bargaining table, or to sit almost forever, or to make concessions here and there, could be the very means by which to conceal a purposeful strategy to make bargaining futile or fail. Hence, we have said in more colorful language it takes more than mere "surface bargaining," or "shadow boxing to a draw," or "giving

the Union a runaround while purporting to be meeting with the Union for purpose of collective bargaining."

Since the Union in the instant proceeding has made considerable concessions on C.O.L.A., the optical plan, random days and the Christmas bonus, the "that is it" (take it or leave it) or all or nothing-at-all approach by which the company rejected the union proposals and counterproposals, reneging on items already agreed upon and presenting and changing its own bargaining proposals and counterproposals, taking a harder and harder bargaining position since December 15, 1980, without offering any substantiated reasons or justifications therefor, and finally only making a qualified concession to the one outstanding issue on amnesty, such conduct clearly constituted surface bargaining by Respondent, without a good faith intent to reach a final agreement. Carpenters Local No. 1780, 244 NLRB 277, 281 and Metlox Manufacturing Company, 225 NLRB 1317, 1323.

Whenever the Respondent herein reneged on bargaining issues already agreed upon, its explanation for such actions was that business was getting worse or it was trying to make its parts assembly operation competitive. Respondent offered no probative financial data to support these contentions, which I do not credit, and I find in the absence of such probative reasons or justifications that Respondent's conducts obstructed the collective-bargaining process. *N.L.R.B. v. Insurance agents' International Union,* 361 U.S. 477, 498 (1960).

I further conclude and find that by embarking upon its course of surface bargaining on and subsequent to December 15, 1980, Respondent frustrated the union in an effort to bargain in good faith and prolonged the strike commenced on September 9, 1980, thereby converting the economic strikers into unfair labor practice strikers (as of December 15) entitled to full reinstatement rights. National Fresh Fruit & Vegetable Company, 227 NLRB 2014 (1977); C & E Stores, Inc., 221 NLRB 1321, 1322 (1976).

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in section III, above, occurring in close connection with its operations as described in section I, above, have a close, intimate, and a substantial relation to trade, traffic and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

It having been found that Respondent interfered with, restrained and coerced its employees in the exercise of their Section 7 protected rights, by unilaterally deciding and actually terminating its parts assembly operation, without first notifying, consulting with and affording the Union, the exclusive bargaining representative of its unit employees, a reasonable and adequate opportunity to bargain about its decision and action, and Respondent has failed and refused to bargain with the Union in violation of Sections 8(a)(1) and (5) of the Act, the recommended Order will provide that Respondent cease and desist from engaging in such conduct, and that it make those laid off employees whole for any loss of earnings occasioned by its unlawful conduct, within the meaning of and in accord with the Board's decision in F.W. Woolworth Company, 90 NLRB 289 (1950), and Florida Steel Corporation, 231 NLRB 117 (1977),[2] except as specifically modified by the wording of such recommended Order.

Because of the character of the unfair labor practices herein found, the recommended Order will provide that Respondent cease and desist from or in any like or related

[2] See generally, Isis Plumbing & Heating Co., 138 NLRB 716 (1962).

manner interfering with, restraining and coercing employees in the exercise of their rights guaranteed by Section 7 of the Act. *N.L.R.B. v. Entwistle Mfg. Co.*, 120 F.2d 532, 536 (C.A. 4).

Upon the basis of the above findings of fact, and upon the entire record in this case, I make the following:

Conclusions of Law

1. Plymouth Stamping Division, Eltec Corporation, the Respondent herein, is an employer engaged commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 985, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW), the Union, is and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to furnish the Union with financial information for its consideration in determining if or how much economic (financial) relief the Union was able or willing to grant, at the employer's requests, Respondent has violated Section 8(a)(1) and (5) of the Act.

4. By unilaterally deciding and actually terminating its parts assembly operation without first notifying, consulting and affording the Union (Local 985) reasonable and adequate opportunity to bargain with it about its decision and action, the Respondent has violated Section 8(a)(1) and (5) of the Act.

5. By constantly changing its bargaining position and increasing its demands without making any significant concessions while the Union was making nearly all of the concessions, the Respondent has engaged in surface bargaining, in bad faith, in violation of Section 8(a)(5) of the Act.

6. By engaging in such surface bargaining the Respondent has frustrated the good faith efforts of the union and has prolonged the strike thereby converting the economic strikers into unfair labor practice strikers since December 15, 1980.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[3]

ORDER

Respondent, Plymouth Stamping Division, Eltec Corporation, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Failing and refusing to furnish the Union with financial information necessary for its consideration in order to determine if or how much economic relief the union is able or willing to grant at the employer's request.

(b) Unilaterally deciding and terminating its parts assembly operation of its unit employees without first notifying, consulting with, and affording the Union a reasonable and adequate opportunity to bargain with it about such decision and action.

(c) Constantly changing its bargaining positions and increasing its bargaining demands without making reasonable justification or significant concessions while the Union makes substantially all of the concessions, and thereby engaging in surface bargaining in bad faith.

(d) Prolonging employees' economic strike by engaging in bad faith surface bargaining.

(e) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

[3] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Offer to and, upon request, bargain collectively in good faith with the Charging Party as the exclusive bargaining representative of the employees in the unit described below with respect to its decision to terminate its parts assembly operations and with respect to other matters concerning wages, hours, and terms and conditions of employment:

All full-time and regular part-time production and maintenance employees employed by Respondent at its facility located at 315 West Ann Arbor Road, Plymouth, Michigan including leaders, and shipping receiving employees; but excluding office clerical employees, technical employees, professional employees, and guards and supervisors as defined in the Act.

(b) Upon conditional application thereof, offer the unfair labor practice strikers referred to in the above described appropriate unit, reinstatement to their former positions, discharging replacements if necessary, or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privilege previously enjoyed: Wilson Holifield, Billy Wilson, Roy Bartlett, Fred Ratledge, Sherman Little, Donald Uhrich, Eugene Reed, Myron Severson, Rosalie Owens, Mitko Jancevski, Michael McColloch, Waltraud Tews, William Odom, Elzbieta Wilson, David Hudson, Carlton Falk, John Sharkany, David Buford, Henry Honeycutt, Bobby Main, Barry Isaacson, Ruben Davis, Kyle Evans, Lottie Davis

(c) Make whole the above-named employees who were affected by the decision to terminate the parts assembly operation, at their normal rates of pay when last in Respondent's employ prior to the

implementation of its decision to terminate the parts assembly operation, by payment of backpay from February 15, 1980 until the earlier of the following events: (1) the date Respondent bargains to agreement with the Charging Party on the subject of the decision to terminate the parts assembly operation; or (2) a bona fide impasse in bargaining over said decision and action has occurred.

(d) Reserve, and upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay which may be due under the terms of this recommended Order.

(e) Post at Respondent's Plymouth, Michigan facility, copies of the attached notice marked "Appendix".[4] Copies of said notice on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. December 3, 1982

[4] In the event that the Board's Order is enforced by a Judgement of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Supreme Court, U.S.
FILED
SEP 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-113

In the Supreme Court of the United States

OCTOBER TERM, 1989

PLYMOUTH STAMPING DIVISION,
ELTEC CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board properly found that petitioner's decision to subcontract its parts-assembly operation was a mandatory subject of bargaining under the National Labor Relations Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 870 F.2d 1112. The decision and order of the National Labor Relations Board (Pet. App. 10a-38a) and the decision of the administrative law judge (Pet. App. 39a-75a) are reported at 286 N.L.R.B. No. 85.

JURISDICTION

The judgment of the court of appeals was entered on March 27, 1989. The petition for a writ of certiorari was filed on June 26, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner manufactures and sells automotive parts and related products in Plymouth, Michigan. Since about 1960, the Union—Local 985, United Automobile, Aerospace and Agricultural Implement Workers of America—has been the exclusive collective-bargaining representative of petitioner's production and maintenance employees. Until 1980, about one-third of the 75 employees in the bargaining unit worked in petitioner's parts-assembly operation. Pet. App. 11a-12a, 42a.

In 1977, petitioner began to face serious financial problems. In August 1979, petitioner unsuccessfully sought from the Union mid-contract concessions with respect to wages, cost of living adjustments (COLA), and health benefits. Pet. App. 11a.[1] After those negotiations failed, petitioner decided to subcontract its parts-assembly operations. On February 8, 1980, petitioner agreed to move its parts-assembly work to facilities located in Wauseon, Ohio, that were leased by a firm named Stamtec. *Id.* at 2a, 13a, 49a.[2]

On Monday, February 11, 1980, petitioner gave the Union written notice that, "due to business and economic reasons," petitioner would terminate its part-assembly operation on February 15, and that affected employees (about 25) would be transferred or laid off in accordance with the collective-bargaining agreement. Pet. App. 12a. The notice concluded with the statement: "We are pre-

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[1] After the parties failed to reach agreement on the requested concessions, petitioner declared a moratorium on all contractual wage and COLA increases, and withheld the increases on September 10, 1979. The Union immediately filed a grievance, and petitioner paid the increases in December 1979. Pet. App. 12a, 43a-45a.

[2] Stamtec was incorporated in 1980. Petitioner's vice president and general manager was a 38% shareholder in Stamtec. Pet. App. 51a.

pared to discuss the matter with you further." *Ibid.* The Union then requested a meeting, but petitioner responded that the meeting could not be held until February 14. *Id.* at 12a, 45a.

At the February 14 meeting, petitioner's vice president stated that petitioner's problems resulted from a decline in sales, noncompetitive wages and benefits for parts-assembly employees, and high state taxes and workers' compensation costs. The Union asked what could be done to keep the assembly work in the plant. Petitioner stated that the Union would have to accept: (1) substantial reductions in wages and benefits, (2) changes in the grievance procedures, and (3) relief from various work rules. Petitioner further stated that its decision was not irreversible, but that for "economic reasons" it needed an answer by the next morning. Pet. App. 12a-13a. The Union requested a delay until the following Monday, February 18, when its president and chief negotiator would return from vacation, and the Union could hold a membership meeting. *Id.* at 12a-15a.

In a letter dated February 14, but not received by petitioner until February 20, the Union requested more specific information about petitioner's decision. In the meantime, after petitioner's attorney advised petitioner to proceed, the parts-assembly equipment was moved to Ohio on February 16 and 17. Pet. App. 13a. On March 1, petitioner and Stamtec entered into a formal agreement under which Stamtec leased petitioner's equipment needed to perform assembly work. *Id.* at 3a. Stamtec also took an option to purchase the equipment. Petitioner retained the right to terminate the lease and repossess the equipment, and also retained its customers' purchase orders in order to monitor quality control. *Id.* at 4a, 14a-15a. On July 1, Stamtec exercised its option and purchased the leased equipment for $132,430. *Id.* at 4a.

2. The Union filed unfair labor practice charges against petitioner. The Board ruled that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by failing to give the Union a meaningful opportunity to bargain over its February decision to subcontract its parts-assembly operation. The Board found that petitioner's February decision to subcontract its parts operation was motivated by labor costs, within the meaning of the Board's decision in *Otis Elevator Co.*, 269 N.L.R.B. 891 (1984), and was not "a fundamental change in the nature and direction of [petitioner's] business." Pet. App. 11a.[3] The Board noted that, "had [petitioner] obtained the specific cost concessions it desired, it would not have transferred its parts assembly operation despite the considerable arrangements previously made to effect the transfer." *Id.* at 16a. The Board stated that petitioner's decision to subcontract "came on the heels of unsuccessful attempts to obtain economic concessions from the Union." *Id.* at 15a. Moreover, petitioner admitted when it met with the Union on February 14, that "its decision was based on specific enumerated factors, in-

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[3] In *Otis Elevator*, Chairman Dotson and Member Hunter held that "management decisions, other than partial closings" need not be bargained over if they "turn[] upon a change in the nature or direction of the business." 269 N.L.R.B. at 892, 893 (plurality opinion). But such decisions that "turn[] upon labor costs" are subject to mandatory bargaining. *Id.* at 892. The Board in the present case concluded that petitioner's subcontracting decision was subject to mandatory bargaining "under any of the views expressed in *Otis Elevator*, including under the analysis set forth in the plurality opinion." Pet. App. 11a. Chairman Dotson dissented in this case because he did not agree that petitioner's February 1980 decision was based on labor costs. In his view, the facts established that the decision "turned * * * upon a significant change in the nature and direction of the business and therefore was not subject to mandatory bargaining." Pet. App. 36a.

cluding labor costs." *Ibid.* And the Board found that the "level of importance" petitioner attached to labor costs was made clear at the February 14 meeting when petitioner stated that the Union's agreement to substantial wage reductions and other concessions "would keep the parts assembly jobs in the plant." *Ibid.*

The Board rejected the argument that "[petitioner's] action represented a 'significant change in operations' so as to fall outside the scope of mandatory bargaining." Pet. App. 16a. The Board explained that, prior to the July 1 sale of the equipment, petitioner had subcontracted its parts-assembly work "in a manner which did not significantly alter [its] business." *Ibid.* The Board noted that—both before and after February 15—petitioner engaged in the business of performing parts-assembly work for its customers. In addition, petitioner: (1) prepared a stockpile of assembled goods to avoid a break in continuity, (2) retained both its customers' purchase orders and the right to control quality, and (3) "was not required to engage in a substantial capital restructuring" because of the lease arrangement. *Id.* at 17a. The Board, therefore, concluded that petitioner was required to bargain over its subcontracting decision.[4]

The Board agreed with petitioner, however, that the July 1 sale represented "a major entrepreneurial decision not amenable to resolution through the collective-bargaining process" (Pet. App. 32a), within the meaning of this Court's decision in *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). Thus, the Board ruled that petitioner's "breach of its obligation to bargain with the Union concerning its decision regarding its parts assembly operation ceased as of 1 July." Pet. App. 32a. Accord-

[4] The Board found no merit to petitioner's claim that it had offered the Union a reasonable opportunity to bargain. Pet. App. 18a n.12.

ingly, the Board limited its remedial order; it ordered petitioner to give backpay to laid-off employees for the period of February 15 through June 30, 1980. *Id.* at 30a-31a.

3. The court of appeals enforced the Board's order. Pet. App. 9a. The court applied the principles set forth by this Court in *First Nat'l Maintenance Corp.* v. *NLRB, supra*, and in *Fibreboard Paper Prod. Corp.* v. *NLRB*, 379 U.S. 203 (1964). Pet. App. 5a-7a. The court agreed with the Board that: (1) the subcontracting did not significantly alter the nature of petitioner's work, (2) the decision to subcontract involved no significant investment of capital, and (3) the decision "did not commit petitioner to a new enterprise nor signify any permanent withdrawal from a previous line of business at least until the sale of the equipment on July 1." *Id.* at 7a. In addition, the court found it "most significant" that whether the Union would be willing to agree to concessions was critical to petitioner's decision to subcontract the work. *Id.* at 7a-8a.[5]

ARGUMENT

1. In *First Nat'l Maintenance*, on which petitioner relies (Pet. 7-9), the Court held that an employer's decision "to shut down part of its business purely for economic reasons * * * is *not* part of § 8(d)'s 'terms and conditions' * * * over which Congress has mandated bargaining." 452 U.S. at 686.[6] While it "intimate[d] no view as to other types of management decisions, such as plant relocations,

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[5] The court further found that substantial evidence supported the Board's finding that petitioner had not offered the Union a reasonable opportunity to bargain over the decision to subcontract. Pet. App. 9a. Petitioner does not challenge that ruling.

[6] Section 8(d) of the Act, 29 U.S.C. 158(d), requires the employer and the bargaining representative to "confer in good faith with respect to wages, hours, and other terms and conditions of employment."

sales, other kinds of subcontracting, automation, etc., which are to be considered on their particular facts," *id.* at 686 n.22, the Court did establish a general framework for determining whether bargaining is required for those decisions. The Court said: "[I]n view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business." *Id.* at 679. .

The Court in *First Nat'l Maintenance* relied (452 U.S. at 676-679) on its earlier decision in *Fibreboard* that an employer's decision to subcontract maintenance work was a mandatory subject of bargaining. 379 U.S. at 215. The Court in *Fibreboard* noted (*id.* at 213):

> The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business.

In *Fibreboard*, the Court "also emphasized that a desire to reduce labor costs, which it considered a matter 'peculiarly suitable for resolution within the collective bargaining framework,' was at the base of the employer's decision to subcontract." *First Nat'l Maintenance*, 452 U.S. at 680 (quoting *Fibreboard*, 379 U.S. at 214).

The Board's decision here follows directly from this Court's decisions in *Fibreboard* and *First Nat'l*

Maintenance. Indeed, the only difference between this case and *Fibreboard* is that the subcontracted work here was performed away from the plant. But petitioner made it clear to the Union that there were no barriers to returning the work to the plant if concessions could be worked out. Thus, this case is indistinguishable from *Fibreboard.* In both cases, the employer "replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment." 379 U.S. at 213.

Contrary to petitioner's contention (Pet. 7-8), the Board did not require bargaining over the subcontracting decision simply because petitioner showed a concern for labor costs. Rather, the Board found that petitioner's decision to subcontract its parts-assembly operation, while retaining ownership of the equipment and control of its customers' orders, did not involve any significant change in petitioner's operations. See Pet. App. 16a. Nor did it significantly alter the scope or direction of petitioner's business. *Ibid.* In view of those findings, and the additional finding that the decision did turn on the availability of cost concessions from the Union (*ibid.*), petitioner's decision to subcontract work presented a classic case where the benefits of collective bargaining "outweigh[] the burden [it] place[s] on the conduct of the business." *First Nat'l Maintenance*, 452 U.S. at 679.

2. The decision below does not conflict with the decisions of any other court of appeals. In *Arrow Automobile Industries, Inc.* v. *NLRB*, 853 F.2d 223, 230 (4th Cir. 1988), the court held that the employer's decision to close one of its plants was a "partial closing" within the meaning of *First Nat'l Maintenance*. That holding is entirely consistent with the result in this case. Here, the Board ruled that petitioner's July 1980 sale of its parts-assembly

equipment was a partial closing of its business and therefore was not a mandatory subject of bargining.[7]

In any event, the court of appeals in *Arrow* observed that, although labor costs played a part in the employer's decision to close a plant, another factor was a 40% decline in the market served by that plant. The court stated that there was "no reason to believe that bargaining could have had any effect on this aspect of [the] decision." 853 F.2d at 230. In this case, as the Board found, petitioner made it clear that its decision could be changed if the Union agreed to a reduction in labor costs.

The other cases that petitioner cites (Pet. 12) are also not in conflict with the decision here. *Royal Typewriter Co.* v. *NLRB*, 533 F.2d 1030, 1038 n.9, 1039 (8th Cir. 1976), involved an employer's decision to shut down certain operations because of economic reasons unrelated to high labor costs. And in *NLRB* v. *Transmarine Navigation Corp.*, 380 F.2d 933, 936 (9th Cir. 1967), the employer "discontinue[d] its operations and relocate[d] in a different area as a minority partner" in order to keep a valued customer. None of those cases considered the type of management decision at issue here—*i.e.*, one motivated by labor costs that results in "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment." *Fibreboard*, 379 U.S. at 215.

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[7] Petitioner's characterization of its February decision as a "business termination decision" (*e.g.*, Pet. 7) is incorrect. The decision to terminate part of its business was not effectuated until the July 1 sale, and the Board held that the obligation to bargain ceased as of that date.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1989

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00518